

---

# TEXAS REGISTER

*Volume 29*

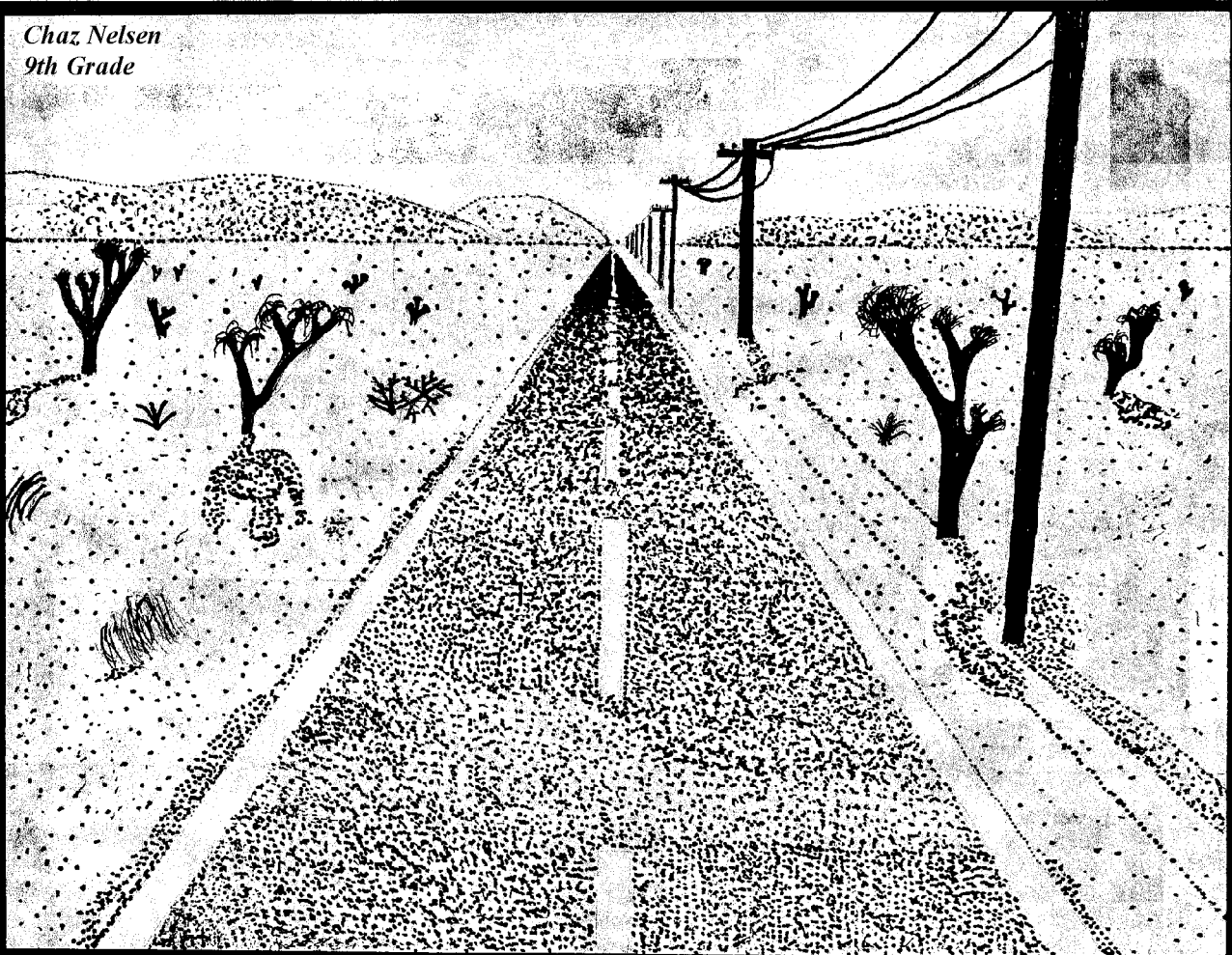
*Number 21*

*May 21, 2004*

*Pages 5003-5150*

---

*Chaz Nelsen  
9th Grade*



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

***Texas Register*, (ISSN 0362-4781)**, is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year \$200. First Class mail subscriptions are available at a cost of \$300 per year. Single copies of most issues for the current year are available at \$10 per copy in printed format.

Material in the ***Texas Register*** is the property of the State of Texas. However, it may be copied, reproduced, or republished by any person without permission of the ***Texas Register*** Director, provided no such republication shall bear the legend ***Texas Register*** or "Official" without the written permission of the director.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Austin, Texas and additional mailing offices.

**POSTMASTER:** Send address changes to the ***Texas Register***, P.O. Box 13824, Austin, TX 78711-3824.



a section of the  
Office of the Secretary of State  
P.O. Box 13824  
Austin, TX 78711-3824  
(800) 226-7199  
(512) 463-5561  
FAX (512) 463-5569  
<http://www.sos.state.tx.us>  
[subadmin@sos.state.tx.us](mailto:subadmin@sos.state.tx.us)

**Secretary of State –**  
Geoffrey S. Connor  
**Director –** Dan Procter

**Staff**  
Ada Aulet  
Leti Benavides  
Dana Blanton  
Carla Carter  
LaKiza Fowler-Sibley  
Kris Hogan  
Roberta Knight  
Jill S. Ledbetter  
Diana Muniz

# IN THIS ISSUE

## **ATTORNEY GENERAL**

Request for Opinion.....	5009
Opinions.....	5009

## **PROPOSED RULES**

### **TEXAS DEPARTMENT OF AGRICULTURE**

#### **QUARANTINES**

4 TAC §19.300.....	5011
--------------------	------

### **TEXAS FEED AND FERTILIZER CONTROL SERVICE/OFFICE OF THE TEXAS STATE CHEMIST**

#### **COMMERCIAL FEED RULES**

4 TAC §61.91.....	5012
-------------------	------

#### **COMMERCIAL FERTILIZER RULES**

4 TAC §65.51.....	5012
4 TAC §65.91.....	5012

### **TEXAS STATE BOARD OF BARBER EXAMINERS**

#### **PRACTICE AND PROCEDURE**

22 TAC §51.12.....	5013
22 TAC §51.98.....	5013

### **TEXAS STATE BOARD OF PLUMBING EXAMINERS**

#### **ADMINISTRATION**

22 TAC §361.1.....	5014
22 TAC §361.6.....	5018
22 TAC §§361.22 - 361.24, 361.26, 361.27.....	5021
22 TAC §361.29.....	5021

#### **LICENSING AND REGISTRATION**

22 TAC §365.14.....	5022
---------------------	------

#### **ENFORCEMENT**

22 TAC §367.1.....	5026
22 TAC §367.3.....	5026
22 TAC §§367.8 - 367.14.....	5027

### **TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM**

#### **CREDITABLE SERVICE**

34 TAC §105.5.....	5031
--------------------	------

#### **MISCELLANEOUS RULES**

34 TAC §107.14.....	5032
---------------------	------

### **TEXAS YOUTH COMMISSION**

#### **INTERACTION WITH THE PUBLIC**

37 TAC §81.79.....	5033
--------------------	------

#### **PURCHASING YOUTH SERVICES**

37 TAC §§83.1, 83.3, 83.21, 83.23, 83.25, 83.27, 83.35, 83.37, 83.39, 83.47, 83.49.....	5034
--	------

#### **YOUTH DISCIPLINE**

37 TAC §95.55.....	5034
--------------------	------

### **CONTRACTING FOR SERVICES OTHER THAN YOUTH SERVICES**

37 TAC §§111.1, 111.7, 111.9, 111.11, 111.13, 111.15, 111.17, 111.21, 111.25, 111.35, 111.45.....	5036
--	------

#### **CONTRACTS**

37 TAC §§111.1, 111.7, 111.9, 111.11, 111.13, 111.15, 111.17...	5037
37 TAC §§111.31, 111.37, 111.39, 111.45, 111.49, 111.51, 111.57, 111.61.....	5042
37 TAC §§111.73, 111.77, 111.81, 111.87.....	5046

## **WITHDRAWN RULES**

### **TEXAS BOARD OF PROFESSIONAL LAND SURVEYING**

#### **GENERAL RULES OF PROCEDURES AND PRACTICES**

22 TAC §661.62.....	5053
---------------------	------

### **EMPLOYEES RETIREMENT SYSTEM OF TEXAS**

#### **DEFERRED COMPENSATION**

34 TAC §§87.1, 87.3, 87.5, 87.7, 87.9, 87.11, 87.13, 87.15, 87.17, 87.19, 87.21, 87.25, 87.31, 87.33, 87.34.....	5053
---	------

### **TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION**

#### **LICENSING REQUIREMENTS**

37 TAC §217.11.....	5053
---------------------	------

## **ADOPTED RULES**

### **OFFICE OF THE SECRETARY OF STATE**

#### **UNIFORM COMMERCIAL CODE**

1 TAC §95.205.....	5055
1 TAC §95.205.....	5055

### **TEXAS HEALTH AND HUMAN SERVICES COMMISSION**

#### **MEDICAID REIMBURSEMENT RATES**

1 TAC §355.5902.....	5056
----------------------	------

### **TEXAS HIGHER EDUCATION COORDINATING BOARD**

#### **RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS**

19 TAC §4.22, §4.23.....	5056
19 TAC §4.35.....	5057
19 TAC §4.83.....	5057

19 TAC §4.85 .....	5058
<b>CREATION, EXPANSION, DISSOLUTION, OR CONSERVATORSHIP OF PUBLIC COMMUNITY COLLEGE DISTRICTS</b>	
19 TAC §8.1 .....	5059
19 TAC §§8.21 - 8.26, 8.29, 8.30, 8.33 - 8.36 .....	5060
19 TAC §§8.51, 8.53 - 8.55 .....	5060
19 TAC §§8.72 - 8.76 .....	5060
19 TAC §§8.91, 8.94, 8.96, 8.98 .....	5061
19 TAC §§8.121 - 8.124 .....	5061
<b>PROGRAM DEVELOPMENT IN PUBLIC COMMUNITY/JUNIOR COLLEGE DISTRICTS AND TECHNICAL COLLEGES</b>	
19 TAC §9.1 .....	5061
19 TAC §§9.21 - 9.31 .....	5062
19 TAC §§9.51 - 9.55 .....	5062
19 TAC §§9.71 - 9.77 .....	5062
19 TAC §§9.91 - 9.96 .....	5063
19 TAC §§9.111 - 9.117 .....	5063
19 TAC §§9.121 - 9.128 .....	5063
19 TAC §§9.141 - 9.144, 9.146, 9.147 .....	5064
19 TAC §§9.161 - 9.163 .....	5064
19 TAC §§9.181 - 9.186 .....	5064
<b>PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES</b>	
19 TAC §9.1 .....	5065
19 TAC §§9.21 - 9.31 .....	5066
19 TAC §§9.51 - 9.55 .....	5067
19 TAC §§9.71 - 9.77, 9.80 .....	5067
19 TAC §§9.91 - 9.96 .....	5068
19 TAC §§9.111 - 9.117 .....	5069
19 TAC §§9.121 - 9.128 .....	5069
19 TAC §§9.141 - 9.144, 9.146, 9.147 .....	5069
19 TAC §§9.161 - 9.163 .....	5070
19 TAC §§9.181 - 9.186 .....	5070
<b>INSTITUTIONAL EFFECTIVENESS IN PUBLIC TWO-YEAR COLLEGES</b>	
19 TAC §§10.1 - 10.3 .....	5070
19 TAC §10.23 .....	5071
<b>CAREER SCHOOLS AND COLLEGES</b>	
19 TAC §§12.1 - 12.3 .....	5071
19 TAC §§12.1 - 12.3 .....	5071

19 TAC §§12.21 - 12.39 .....	5072
19 TAC §§12.21 - 12.39 .....	5072
19 TAC §§12.41 - 12.46 .....	5072
19 TAC §§12.41 - 12.46 .....	5073
<b>FINANCIAL PLANNING</b>	
19 TAC §13.1 .....	5073
19 TAC §§13.20 - 13.24 .....	5074
19 TAC §13.25 .....	5076
19 TAC §§13.43, 13.45 - 13.47 .....	5078
19 TAC §13.63, §13.64 .....	5078
19 TAC §§13.190, 13.193 - 13.195 .....	5079
<b>OPTIONAL RETIREMENT PROGRAM</b>	
19 TAC §§25.1 - 25.3 .....	5079
19 TAC §§25.1 - 25.6 .....	5079
<b>TEXAS DEPARTMENT OF INSURANCE</b>	
<b>HEALTH MAINTENANCE ORGANIZATIONS</b>	
28 TAC §11.2 .....	5098
28 TAC §11.508, §11.509 .....	5100
<b>TRADE PRACTICES</b>	
28 TAC §§21.3501 - 21.3505 .....	5106
28 TAC §§21.3510 - 21.3518 .....	5107
28 TAC §§21.3525 - 21.3530, 21.3535 .....	5112
28 TAC §§21.3540 - 21.3544 .....	5112
<b>TEXAS DEPARTMENT OF HUMAN SERVICES</b>	
<b>CONTRACTING TO PROVIDE PRIMARY HOME CARE</b>	
40 TAC §§47.1, 47.3, 47.5 .....	5113
40 TAC §47.11 .....	5115
40 TAC §§47.21, 47.23, 47.25 .....	5115
40 TAC §§47.41, 47.43, 47.45, 47.47, 47.49 .....	5115
40 TAC §§47.61, 47.63, 47.65, 47.67, 47.69, 47.71, 47.73 .....	5118
40 TAC §§47.81, 47.83, 47.85, 47.87, 47.89, 47.5902 .....	5118
<b>PRIMARY HOME CARE</b>	
40 TAC §§47.1901 - 47.1904 .....	5118
40 TAC §§47.2901 - 47.2905, 47.2908 - 47.2914 .....	5118
40 TAC §§47.3906 - 47.3908 .....	5119
40 TAC §§47.4902 - 47.4905 .....	5119
40 TAC §47.5902 .....	5119
40 TAC §47.6902 .....	5119
<b>RULE REVIEW</b>	

<b>Proposed Rule Reviews</b>	
Texas Workers' Compensation Commission .....	5121
<b>Adopted Rule Review</b>	
Texas Department of Licensing and Regulation .....	5121
<b>TABLES AND GRAPHICS</b>	
.....	5123
<b>IN ADDITION</b>	
<b>Texas Agriculture Resources Protection Authority</b>	
Notice of Hearing.....	5125
<b>Coastal Coordination Council</b>	
Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program .....	5125
<b>Office of Consumer Credit Commissioner</b>	
Notice of Rate Ceilings .....	5126
<b>Deep East Texas Local Workforce Development Board</b>	
Request for Proposals .....	5126
<b>East Texas Council of Governments</b>	
Notice for Request for Qualifications for Policy Board Training in Fiduciary Responsibilities.....	5126
<b>Texas Education Agency</b>	
Request for Applications Concerning Technology Immersion Pilot (TIP), Round Two .....	5127
Request for Applications Concerning Texas Head Start - Ready to Read Educational Component Grant.....	5127
<b>Texas Commission on Environmental Quality</b>	
Notice of Availability of the Draft Restoration Plan and Environmental Assessment and Federal Consistency Determination with Coastal Management Plan.....	5128
Proposed Enforcement Orders .....	5129
<b>Texas Department of Health</b>	
Licensing Actions for Radioactive Materials.....	5136
Notice of Intent to Revoke Certificates of Registration .....	5140
<b>Houston-Galveston Area Council</b>	
Proposed Changes to Financial Assistance for Child Care.....	5140
<b>Texas Department of Insurance</b>	
Company Licensing .....	5141
Third Party Administrator Applications .....	5141
<b>Public Utility Commission of Texas</b>	
Notice of Application for Amendment to Service Provider Certificate of Operating Authority.....	5141
Notice of Application for Amendment to Service Provider Certificate of Operating Authority.....	5142
Notice of Application for Amendment to Service Provider Certificate of Operating Authority.....	5142
Notice of Application for Waiver of Denial of Request for NXX Code .....	5142
Notice of Application to Amend Certificated Service Area Boundaries .....	5142
Notice of Application to Amend Certificated Service Area Boundaries.....	5143
Notice of Application to Amend Designation as an Eligible Telecommunications Provider Pursuant to P.U.C. Substantive Rule §26.417.....	5143
Notice of Application to Amend Designation as an Eligible Telecommunications Carrier Pursuant to P.U.C. Substantive Rule §26.418 .....	5143
Public Notice of CCN Holders Filing Requirements in Order to Calculate the Weighted Statewide Average Composite Usage Sensitive Intrastate Switched Access Rates .....	5143
<b>Texas Residential Construction Commission</b>	
Public Hearing on Proposed Rules .....	5144
Request for Comments on Star Builder Program .....	5144
Strawman Proposal on Limited Statutory Warranty and Building and Performance Standards .....	5145
<b>Texas A&amp;M University, Board of Regents</b>	
Request for Proposal .....	5145
<b>Texas Department of Transportation</b>	
Request for Competing Proposals and Qualifications .....	5145
<b>The University of Texas System</b>	
Notice of Intent to Seek Consulting Services .....	5146
<b>Texas Water Development Board</b>	
Applications Received .....	5147
<b>Texas Workers' Compensation Commission</b>	
Invitation to Apply to the Medical Advisory Committee (MAC).....	5147

# Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.  
<http://www.sos.state.tx.us/texreg>

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is <http://www.oag.state.tx.us>. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site.  
<http://www.state.tx.us/Government>

...

**Meeting Accessibility.** Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

# THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are

requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at <http://www.oag.state.tx.us>. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Request for Opinion

**RQ-0212-GA**

**Requestor:**

Ms. Julie Parsley, Commissioner  
Public Utility Commission of Texas  
Post Office Box 13326  
Austin, Texas 78711

**Requestor:**

Mr. Paul Hudson, Chair  
Public Utility Commission of Texas  
Post Office Box 13326  
Austin, Texas 78711

Re: Impact of the Public Funds Investment Act on a rule of the Public Utility Commission relating to the nuclear decommissioning obligations of a public utility (Request No. 0212-GA)

**Briefs requested by June 10, 2004**

*For further information, please access the website at [www.oag.state.tx.us](http://www.oag.state.tx.us). or call the Opinion Committee at 512/463-2110.*

TRD-200403216  
Nancy S. Fuller  
Assistant Attorney General  
Office of the Attorney General  
Filed: May 12, 2004



Opinions

**Opinion No. GA-0184**

Mr. Randall H. Riley, Executive Director  
Texas Building and Procurement Commission

Post Office Box 13047

Austin, Texas 78711

Re: Whether "vessel and outboard motor ownership records" are "customer information" under section 11.030 of the Parks and Wildlife Code (RQ-0132-GA)

**S U M M A R Y**

"Vessel and outboard motor ownership records" made or kept by the Texas Parks and Wildlife Department under chapter 31 of the Parks and Wildlife Code are not "customer information" under section 11.030 of that code.

**Opinion No. GA-0185**

Mr. Geoffrey S. Connor  
Texas Secretary of State  
Post Office Box 12697

Austin, Texas 78711-2697

Re: Residency requirements for directors of the Texas Mexican Railway Company (RQ-0133-GA)

**S U M M A R Y**

Title 112, article 6288 of the Revised Civil Statutes governs the residency requirements for directors of the Texas Mexican Railway Company.

*For further information, please access the website at [www.oag.state.tx.us](http://www.oag.state.tx.us). or call the Opinion Committee at 512/463-2110.*

TRD-200403194  
Nancy S. Fuller  
Assistant Attorney General  
Office of the Attorney General  
Filed: May 12, 2004



# PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

**Symbols in proposed rule text.** Proposed new language is indicated by underlined text. ~~[Square brackets and strikethrough]~~ indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

## TITLE 4. AGRICULTURE

### PART 1. TEXAS DEPARTMENT OF AGRICULTURE

#### CHAPTER 19. QUARANTINES

##### SUBCHAPTER T. NOXIOUS PLANTS

###### 4 TAC §19.300

The Texas Department of Agriculture (the department) proposes new §19.300, concerning a list of noxious plants. Proposed new §19.300 is necessary to implement the establishment of a noxious plant list in accordance with the passage of Senate Bill 854, 78th Texas Legislature, 2003, which amended the Texas Agriculture Code (the Code), §71.151. Amendments to the Code, §71.151 requires the department by rule to publish a list of noxious plant species that have serious potential to cause economic or ecological harm to the state. The department has consulted with representatives from the agriculture industry, the horticulture industry, the Texas Cooperative Extension, the Texas Department of Transportation, the State Soil and Water Conservation Board, and the Texas Department of Parks and Wildlife in the preparation of this list. The department has considered scientific data and the economic impact of each plant species listed. Proposed new §19.300 establishes a list of noxious plants for Texas.

David Kostroun, assistant commissioner for regulatory programs, has determined that for the first five years the new section is in effect, there will be no fiscal implications for state or local government.

Mr. Kostroun has also determined that for each year of the first five years the new section is in effect, the public benefit anticipated as a result of enforcing and administering the new section will be the recognition of plants in Texas that may cause economic or ecological harm to the state. By law, the noxious plants listed may not be sold, distributed or imported in Texas. There is an anticipated cost to individuals, micro-businesses or small businesses acting as nurseries that are required to comply with the new section. Salt cedar, a listed noxious plant, may be sold at some nurseries and there will be a fiscal impact on nurseries that sell or import salt cedars, however, because the department does not maintain information on the number of locations selling the plants and the quantity of plants sold annually, nor is the information available from other sources, the department is unable to provide an estimate of anticipated costs to affected nurseries at this time.

Comments on the proposal may be submitted to David Kostroun, Assistant Commissioner for Regulatory Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711,

and must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The new section is proposed under the Texas Agriculture Code (the code), §12.016, which provides the department with the authority to adopt rules as necessary for carrying out the department's duties under the code, chapter 71; and the code §71.151., which authorizes the department to publish a list of noxious plant species that have serious potential to cause economic or ecological harm to the state.

The code that will be affected by the proposal is the Texas Agriculture Code, Chapter 71.

###### §19.300. Noxious Plant List.

(a) The following plants have serious potential to cause economic or ecological harm to the state.

Figure: 4 TAC §19.300.

(b) Unless permitted by the Texas Department of Parks and Wildlife Code §66.007, a person commits an offense under the Texas Agriculture Code, §71.152, if the person sells, distributes or imports into the state the plants listed in subsection (a) of this section in any live form.

(c) For the purpose of this section, the term "distributes" does not include the accidental or unintentional movement of noxious plant material in the course of legitimate construction activities or agricultural activities, including but not limited to, re-seeding, transportation of agricultural products, and the movement of farm or earth moving equipment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403139

Dolores Alvarado Hibbs

Deputy General Counsel

Texas Department of Agriculture

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 463-4075



## PART 3. TEXAS FEED AND FERTILIZER CONTROL SERVICE/OFFICE OF THE TEXAS STATE CHEMIST

### CHAPTER 61. COMMERCIAL FEED RULES



## SUBCHAPTER J. ADMINISTRATIVE HEARINGS

### 4 TAC §61.91

The Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist proposes adding a new Subchapter J, Administrative Hearings, to TAC Title 4, Part 3, Chapter 61 of the Texas Commercial Feed Rules, §61.91 Cost of Preparing Agency Record. The new subchapter will ensure the Service's conformity to the Texas Rules of Civil Procedure.

Dr. George W. Latimer, Jr., Texas State Chemist, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Dr. Latimer has also determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a clarification of the Service's policy for dealing with appeals of contested cases and alignment of that policy with Title 1 §2001.177 Administrative Procedures Act. There will be a cost to persons and/or small businesses who choose to appeal decisions by the Service, but those costs are only those allowed by §2001.177(b). The cost would be associated with whatever documentation had to be provided because of the appeal.

Comments on the proposal may be submitted to Dr. George W. Latimer, Jr., P.O. Box 3160, College Station, TX 77841-3160 or by fax at (979) 845-1389.

The new rule is proposed under Texas Agriculture Code 141, §141.004 which provides Texas Feed and Fertilizer Control Service with the authority to promulgate rules relating to the distribution of commercial feeds.

The Texas Agriculture Code Title 4, TAC 141 of the Texas Commercial Feed Control Act, Subchapter F, §141.122, is affected by the proposed new rule.

#### §61.91. Cost of Preparing Agency Record

(a) The Service requires that a party who appeals a final decision in a contested case pay all of the costs associated with preparation of the original or certified copy of the record of the agency's proceedings that is required to be sent to the reviewing court.

(b) A charge imposed under subsection (a) is a court cost and shall be assessed by the court in accordance with the Texas Rules of Civil Procedure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 6, 2004.

TRD-200403078

Dr. George W. Latimer, Jr.  
State Chemist

Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist

Earliest possible date of adoption: June 20, 2004

For further information, please call: (979) 845-1121

## CHAPTER 65. COMMERCIAL FERTILIZER RULES

## SUBCHAPTER E. INSPECTION, SAMPLING, AND ANALYSIS

### 4 TAC §65.51

The Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist proposes to amend TAC Title 4, Part 3, §65.51(a) concerning reference to the 16th edition of the Official Methods of Analysis of AOAC International

Dr. George W. Latimer, Jr. has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Dr. Latimer has also determined that for each year of the first five year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule is that the Service will be able to take advantage of more accurate methods of analyzing fertilizers. There are no anticipated economic costs to persons or small business as a result of this rule.

Comments on the proposal may be submitted to Dr. George W. Latimer, Jr., State Chemist, Office of the Texas State Chemist, P.O. Box 3160, College Station, TX 77841-3160 or by fax at (979) 845-1389.

The amendment is proposed under Texas Agriculture Code 63, §63.004 which provides Texas Feed and Fertilizer Control Service with the authority to promulgate rules relating to the distribution of commercial fertilizers.

The Texas Agriculture Code Title 4, TAC 63 of the Texas Commercial Fertilizer Control Act, Subchapter F, §63.092 is affected by the proposed amendment.

#### *§65.51. Sampling and Analytical Procedures.*

(a) The Service hereby adopts by reference the most recent [~~16th~~] edition of the *Official Methods of Analysis of the AOAC International* as delineating the sampling and analytical procedures to be applied in the administration of the Act and this title.

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 6, 2004.

TRD-200403079

Dr. George W. Latimer, Jr.  
State Chemist

Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist

Earliest possible date of adoption: June 20, 2004

For further information, please call: (979) 845-1121

## SUBCHAPTER F. ADMINISTRATIVE HEARINGS

### 4 TAC §65.91

The Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist proposes adding a new Subchapter F, Administrative Hearings, to TAC Title 4, Part 3, Chapter 65 of the Texas Commercial Fertilizer Rules, §65.91 Cost of Preparing Agency

Record. The new subchapter will ensure the Service's conformity to the Texas Rules of Civil Procedure.

Dr. George W. Latimer, Jr., Texas State Chemist, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Dr. Latimer has also determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a clarification of the Service's policy for dealing with appeals of contested cases and alignment of that policy with Title 1 §2001.177 Administrative Procedures Act. There will be a cost to persons and/or small businesses who choose to appeal decisions by the Service, but those costs are only those allowed by §2001.177(b). The cost would be associated with whatever documentation had to be provided because of the appeal.

Comments on the proposal may be submitted to Dr. George W. Latimer, Jr., P.O. Box 3160, College Station, TX 77841-3160 or by fax at (979) 845-1389.

The new rule is proposed under Texas Agriculture Code 63, §63.004 which provides Texas Feed and Fertilizer Control Service with the authority to promulgate rules relating to the distribution of commercial fertilizers.

The Texas Agriculture Code Title 4, TAC 63 of the Texas Commercial Fertilizer Control Act, Subchapter G, §63.122 is affected by the proposed new rule.

§65.91. Cost of Preparing Agency Record.

(a) The Service requires that a party who appeals a final decision in a contested case pay all of the costs associated with preparation of the original or certified copy of the record of the agency's proceedings that is required to be sent to the reviewing court.

(b) A charge imposed under subsection (a) is a court cost and shall be assessed by the court in accordance with the Texas Rules of Civil Procedure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403228

Dr. George W. Latimer, Jr.

State Chemist

Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist

Earliest possible date of adoption: June 20, 2004

For further information, please call: (979) 845-1121



## **TITLE 22. EXAMINING BOARDS**

### **PART 2. TEXAS STATE BOARD OF BARBER EXAMINERS**

#### **CHAPTER 51. PRACTICE AND PROCEDURE SUBCHAPTER B. BARBER COLLEGES, SCHOOLS, AND STUDENTS**

##### **22 TAC §51.12**

The Texas State Board of Barber Examiners proposes an amendment to §51.12 concerning the requirement that a proposed new barber school or college be inspected to determine that it fulfills all requirements of the Board and of the Texas Barber Law. The Board proposes to require that the Board receive payment of the required initial inspection or re-inspection fee before the inspection will be scheduled.

The action is proposed to expedite the school inspection process and to ensure that payment is received before an inspection is scheduled to be conducted.

Glenn Parker, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule

Mr. Parker has determined that for each year of the first five years the rule is to be in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in the efficiency of the Board's school inspection process. There will be no costs to small or large businesses, or to individuals associated with the enforcement of the proposed rule.

Comments on the proposed rule may be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Glenn Parker, Executive Director, Texas State Board of Barber Examiners, 5717 Balcones Drive, Suite 217, Austin, Texas 78731-4203.

The amendment is proposed under the Texas Occupations Code Chapter 1601.151, Chapter 1601.155, Chapter 1601.353, and Chapter 1601.356 which provide the Texas State Board of Barber Examiners with the authority to adopt and enforce all rules necessary for the performance of its duties, to set fees in amounts necessary to cover the costs of administering programs to which the fees relate, and to require inspections of schools before they go into operation.

No other code, article, or statute is affected by this amendment.

§51.12. Inspection of New Barber School or College.

Two board members or one board member and the board's executive director shall inspect a proposed new barber school or college to determine that it [is] fulfills all requirements of the board and of the Texas Barber Law[; §9]. The payment of the required inspection (permit) fee or the re-inspection fee must be received by the board before the initial inspection or re-inspection will be scheduled.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403138

Glenn D. Parker

Executive Director

Texas State Board of Barber Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 936-6310



## **SUBCHAPTER D. BARBER SHOPS**

### **22 TAC §51.98**

The Texas State Board of Barber Examiners proposes an amendment to §51.98 concerning fees to be collected from

licensees or prospective licensees related to providing online services through the Texas Online Authority related to obtaining or renewing certain licenses and permits through the use of the Internet.

The action is proposed in response to the Texas Online Authority's instructions to the Board of Barber Examiners to begin the collection of new fees related to specific types of licenses or permits, under authority granted to the Texas Online Authority by Senate Bill 187, 77th Texas Legislature, Regular Session; Senate Bill 645, 77th Texas Legislature, Regular Session; and by Senate Bill 1152, 78th Texas Legislature, Regular Session.

Glenn Parker, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal implications for local government as a result of enforcing or administering the rule. There will be an impact to state government in that both general revenue and expenditures will increase by the amount of the fees that are collected during each fiscal year of the five year period.

Mr. Parker has determined that for each year of the first five years the rule is to be in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in the ability of Board licensees to more efficiently apply for or renew certain licenses or permits. There will be no direct costs to the general public. Board licensees will pay an increase in fees equal to the cost of the fees for specific types of licenses or permits. There will be an increase in costs for those small businesses that are barber shops or specialty (manicurist) shops equal to the fees imposed for those licenses or permits.

Comments on the proposed rule may be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Glenn Parker, Executive Director, Texas State Board of Barber Examiners, 5717 Balcones Drive, Suite 217, Austin, Texas 78731-4203.

The amendment is proposed under the Texas Occupations Code Chapter 1601.151 and Chapter 1601.155 which provide the Texas State Board of Barber Examiners with the authority to adopt and enforce all rules necessary for the performance of its duties and to set fees in amounts necessary to cover the costs of administering programs to which the fees relate.

No other code, article, or statute is affected by this amendment.

*§51.98. State-Mandated Texas Online Authority Fees [Fee] for Occupational Licensing Transactions [Using the Internet].*

As required by Senate Bill 187, and Senate Bill 645, 77th Texas Legislature, Regular Session, and by Senate Bill 1152, 78th Texas Legislature, Regular Session, specified licensees and permittees [each licensee, upon renewal,] shall pay the following State-Mandated Texas Online Authority Fees [Fee] for Occupational Licensing Transactions. [Using the Internet: \$6 for a barber; \$3 for a manicurist. This fee is in addition to the renewal fee.] These fees are in addition to the original license or permit fees and the license or permit renewal fees.

- (1) Class A Registered Barber License - Original \$6
- (2) Class A Registered Barber License - Renewal \$6
- (3) Barber Technician - Original \$6
- (4) Barber Technician - Renewal n/a
- (5) Manicurist License - Original \$3
- (6) Manicurist License - Renewal \$3
- (7) Barber Shop Permit - Original \$4

- (8) Barber Shop Permit - Renewal \$4
- (9) Manicure (Specialty) Shop Permit - Original \$4
- (10) Manicure (Specialty) Shop Permit - Renewal \$4
- (11) Booth Rental Permit - Original \$4
- (12) Booth Rental Permit - Renewal \$4

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403137

Glenn D. Parker

Executive Director

Texas State Board of Barber Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 936-6310

## PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

### CHAPTER 361. ADMINISTRATION

#### SUBCHAPTER A. GENERAL PROVISIONS

##### 22 TAC §361.1

The Texas State Board of Plumbing Examiners (Board) proposes amendments to Board rule §361.1, which provides definitions of terms used in the Plumbing License Law and Board Rules.

The proposed amendments to §361.1 do not add new requirements, but are necessary due to the codification of the Plumbing License Law (Law) during the 78th Legislative Regular Session, moving the Law from Vernon's Civil Statutes, Article 6243-101 to Title 8, Chapter 1301, Occupations Code. References in the rule made to sections of Vernon's Civil Statutes, Article 6243-101 are proposed to be changed to references in Chapter 1301 of the Occupations Code. The amendments also clarify that the Board's Chief Field Representative is also the Board's Director of Enforcement.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal impact on state and local government as well as small businesses and persons required to comply with these rules amendments.

Mr. Maxwell also has determined that each year of the first five years the rules are effect the public benefit anticipated as a result of enforcing these rules will be that the Board Rule will not be in conflict with state law.

Comments on the proposed rule changes may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §361.1 are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §1301.251 and the rule it amends. §1301.251 requires the Board to adopt

and enforce rules necessary to administer the Plumbing License Law.

No other statute, article or code is affected by this proposed amendment. The proposed amendment has been reviewed by legal counsel and found to be within the state agency's authority to adopt.

*§361.1. Definitions.*

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

(1) Act--The Plumbing License Law, Title 8, Chapter 1301, Occupations Code [Texas Civil Statutes, Article 6243-101], as amended.

(2) Administrative Act--The Administrative Procedure Act, the Texas Government Code, §2001.001, et seq, as amended.

(3) Administrator--The Board-appointed executive director of all Board staff.

(4) Adopted Plumbing Code--A plumbing code, including a fuel gas code adopted by the Board or a political subdivision, including any city, town, village, municipality, public water system, municipal utility district, in compliance with §1301.255 and §1301.551 of the Plumbing License Law [§5B of the Act].

(5) Advisory Committee--A Board appointed committee subject to § 1301.258 of the Plumbing License Law, §361.12 of these rules [5(f) of the Act] and Chapter 2110 of the Government Code, of which the primary function is to advise the Board.

(6) Appliance Connection--An appliance connection procedure using only a code approved appliance connector that does not require cutting into or altering the existing plumbing system.

(7) Applicant--An individual seeking to obtain a License, Registration or Endorsement.

(8) Board--The Texas State Board of Plumbing Examiners.

(9) Board Member--An individual appointed by the governor and confirmed by the senate to serve on the Board.

(10) Building Sewer--The part of the sanitary drainage system outside of the building, which extends from the end of the building drain to a public sewer, private sewer, private sewage disposal system, or other point of sewage disposal.

(11) Certificate of Insurance--a form submitted to the Board certifying that the Responsible Master Plumber carries insurance coverage as specified in § 1301.522 of the Plumbing License Law[45 of the Act] and §367.3 of these Rules.

(12) Chief Examiner--an employee of the Board who, under the direction of the Administrator, coordinates and supervises the activities of the Board examinations and registrations.

(13) Chief Field Representative--the Director of Enforcement who is an employee of the Board who meets the definition of "Field Representative" and, under the direction of the Executive Director [Administrator], coordinates and supervises the activities of the Field Representatives.

(14) Cleanout--A fitting, other than a p-trap, approved by the adopted plumbing code and designed to be installed in a sanitary drainage system to allow easy access for cleaning the sanitary drainage system.

(15) Code-Approved Appliance Connector--A semi-rigid or flexible assembly of tube and fittings approved by the adopted plumbing code and designed for connecting an appliance to the

existing plumbing system without cutting into or altering the existing plumbing system.

(16) Code Approved Existing Opening--For the purposes of drain cleaning activities described in § 1301.002(3) of the Plumbing License Law [2(43) of the Act], a code approved existing opening is any existing cleanout fitting, inlet of any p-trap or fixture, or vent terminating into the atmosphere that has been approved and installed in accordance with the adopted plumbing code.

(17) Complaint--A written charge alleging a violation of state law, Board rules or orders, local codes or ordinances, or standards of competency; or the presence of fraud, false information, or error in the attempt to obtain a License, Registration or Endorsement.

(18) Contested Case--A proceeding, including but not limited to rulemaking, licensing and registering, in which the agency determines the legal right, duties, and privileges of a party after allowing an opportunity for adjudicative hearing of the case.

(19) Continuing Professional Education--Board-approved courses/programs required for a licensee to renew his or her License and/or Endorsement.

(20) Direct Supervision--

(A) The on-the-job oversight and direction of a Registered Plumber's Apprentice performing plumbing work by a licensed plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(i) that the plumbing materials for the job are properly prepared prior to assembly according to the material manufacturers recommendations and the requirements of the adopted plumbing code; and

(ii) that the plumbing work for the job is properly installed to protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(B) The on-the-job oversight and direction by a licensed Plumbing Inspector of an individual training to qualify for the Plumbing Inspector Examination.

(C) For plumbing work performed only in the construction of a new one-family or two-family dwelling in an unincorporated area of the state, a Responsible Master Plumber is not required to provide for the continuous or uninterrupted on-the-job oversight of a Registered Plumber's Apprentice's work by a licensed plumber, however, the Responsible Master Plumber must:

(i) provide for the training and management of the Registered Plumber's Apprentice by a licensed plumber;

(ii) provide for the review and inspection of the Registered Plumber's Apprentice's work by a licensed plumber to ensure compliance with subparagraph (A)(i) and (ii) of this paragraph; and

(iii) upon request by the Board, provide the name and plumber's license number of the licensed plumber who is providing on-the-job training and management of the Registered Plumber's Apprentice and who is reviewing and inspecting the Registered Plumber's Apprentice's work on the job, or the name and plumber's license number of the licensed plumber who trained and managed the Registered Plumber's Apprentice and who reviewed and inspected the Registered Plumber's Apprentice's work on a job.

(21) Drain Cleaner--An individual who has completed at least 4,000 hours working under the supervision of a Master Plumber as a registered Drain Cleaner-Restricted Registrant, who has fulfilled

the requirements of and is registered with the Board, and who installs cleanouts and removes and resets p-traps to eliminate obstructions in building drains and sewers.

(22) Drain Cleaner-Restricted Registrant--An individual who has worked as a registered Plumber's Apprentice under the supervision of a Master Plumber, who has fulfilled the requirements of and is registered with the Board, and who clears obstructions in sewer and drain lines through any code-approved existing opening.

(23) Endorsement--a certification issued by the Board in addition to the Master or Journeyman Plumber License.

(24) Field Representative--for the purposes of these Rules,

(A) "Field Representative" means an employee of the Board who is:

(i) knowledgeable of this Act and of municipal ordinances relating to plumbing;

(ii) qualified by experience and training in good plumbing practice and compliance with this Act;

(iii) designated by the Board to assist in the enforcement of this Act and rules adopted under this Act.

(B) A field representative may:

(i) Make on-site license and registration checks to determine compliance with this Act;

(ii) investigate consumer complaints filed under § 1301.303 of the Plumbing License Law [8A of this Act];

(iii) assist municipal plumbing inspectors in cooperative enforcement of this Act; and

(iv) issue citations as provided by § 1301.502 of the Plumbing License Law [14 of this Act].

(25) Journeyman Plumber--An individual licensed under this Act who has met the qualifications for registration as a Plumber's Apprentice or for licensure as a Tradesman Plumber-Limited Licensee, who has completed at least 8,000 hours working under the supervision of a master plumber, who supervises, engages in, or works at the actual installation, alteration, repair, service and renovating of plumbing, and who has successfully fulfilled the examinations and requirements of the Board.

(26) License--A document issued by the Board to certify that the named individual fulfilled the requirements of the Act and of these rules to hold a license issued by the Board.

(27) Licensing and Registering--The process of granting, denying, renewing, revoking, or suspending a License, Registration or Endorsement.

(28) Maintenance Man or Maintenance Engineer--An employee, as opposed to an independent contractor, who performs plumbing maintenance work incidental to and in connection with other duties. "Incidental to and in connection with" includes the repair, maintenance and replacement of existing potable water piping, existing sanitary waste and vent piping, existing plumbing fixtures and existing water heaters. "Incidental to and in connection with" does not include cutting into fuel gas plumbing systems and the installation of gas fueled water heaters. An individual who erects, builds, or installs plumbing not already in existence may not be classified as a maintenance man or maintenance engineer. Plumbing work performed by a maintenance man or maintenance engineer is not exempt from state law and municipal rules and ordinances regarding plumbing codes, plumbing permits

and plumbing inspections. Such maintenance individuals shall not engage in plumbing work for the general public.

(29) Master Plumber--An individual licensed under this Act who is skilled in the planning, superintending, and the practical installation, repair, and service of plumbing, who secures permits for plumbing work, who is knowledgeable about the codes, ordinances, or rules and regulations governing those matters, who alone, or through an individual or individuals under his supervision, performs plumbing work, and who has successfully fulfilled the examinations and requirements of the Board.

(30) Medical Gas Piping Installation Endorsement--a document entitling the holder of a Master or Journeyman Plumber License to install piping that is used solely to transport gases used for medical purposes including, but not limited to oxygen, nitrous oxide, medical air, nitrogen, medical vacuum.

(31) One Family Dwelling--a detached structure designed for the residence of a single family that does not have the characteristics of a multiple family dwelling, and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(32) Party--Each person named or admitted in association with an action as a party.

(33) Paid Directly--As related to § 1301.255(e) of the Plumbing License Law [5B(e) of the Act] and §365.1(4)(B) of these Rules, "paid" and "directly" have the common meanings and "paid directly" means that compensation for plumbing inspections must be paid by the political subdivision to the individual Licensed Plumbing Inspector who performed the plumbing inspections.

(34) Person--For the purposes of these Rules only, a person means an individual, partnership, corporation, limited liability company, association, governmental subdivision or public or private organization of any character other than an agency.

(35) Petitioner--A person asking the Board to adopt a rule.

(36) Plumber's Apprentice--any individual other than a Master Plumber, Journeyman Plumber, or Tradesman Plumber-Limited Licensee who, as his or her principal occupation, is engaged in learning and assisting in the installation of plumbing, is registered by the Board, and works under the supervision of a licensed Master Plumber and the direct supervision of a licensed plumber.

(37) Plumbing--All piping, fixtures, appurtenances, and appliances, including disposal systems, drain or waste pipes, or any combination of these that: supply, recirculate, drain, or eliminate water, gas, medical gasses and vacuum, liquids, and sewage for all personal or domestic purposes in and about buildings where persons live, work, or assemble; connect the building on its outside with the source of water, gas, or other liquid supply, or combinations of these, on the premises, or the water main on public property; and carry waste water or sewage from or within a building to the sewer service lateral on public property or the disposal or septic terminal that holds private or domestic sewage. The installation, repair, service, maintenance, alteration, or renovation of all piping, fixtures, appurtenances, and appliances on premises where persons live, work, or assemble that supply gas, medical gasses and vacuum, water, liquids, or any combination of these, or dispose of waste water or sewage.

(38) Plumbing Company--A person, as defined in these Rules, who engages in the plumbing business.

(39) Plumbing Inspection--Any of the inspections required in § 1301.255 and §1301.551 of the Plumbing License Law [5B and §15(a) of the Act], including any check of pipes, faucets, tanks, valves,

water heaters, plumbing fixtures and appliances by and through which a supply of water, gas, medical gasses or vacuum, or sewage is used or carried that is performed on behalf of any political subdivision, public water supply, municipal utility district, town, city or municipality to ensure compliance with the adopted plumbing and gas codes and ordinances regulating plumbing.

(40) Plumbing Inspector--means any individual who is employed by a political subdivision, or who contracts as an independent contractor with a political subdivision, for the purpose of inspecting plumbing work and installations in connection with health and safety laws, ordinances, and plumbing and gas codes, who has no financial or advisory interests in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Board.

(41) Pocket Card--A card issued by the Board which certifies that the holder has a Master Plumber License, Journeyman Plumber License, Tradesman Plumber-Limited License, Plumbing Inspector License, Residential Utilities Installer Registration, Drain Cleaner Registration, Drain Cleaner-Restricted Registration or a Plumber's Apprentice Registration..

(42) Political Subdivision--A political subdivision of the State of Texas that includes a:

- (A) city;
- (B) county;
- (C) school district;
- (D) junior college district;
- (E) municipal utility district;
- (F) levee improvement district;
- (G) drainage district;
- (H) irrigation district;
- (I) water improvement district;
- (J) water control improvement district;
- (K) water control preservation district;
- (L) freshwater supply district;
- (M) navigation district;
- (N) conservation and reclamation district;
- (O) soil conservation district;
- (P) communication district;
- (Q) public health district;
- (R) river authority; and
- (S) any other governmental entity that:

(i) embraces a geographical area with a defined boundary;

(ii) exists for the purpose of discharging functions of government and;

(iii) possesses authority for subordinate self government through officers selected by it.

(43) P-Trap--A fitting connected to the sanitary drainage system for the purpose of preventing the escape of sewer gasses from the sanitary drainage system and designed to be removed to allow for cleaning of the sanitary drainage system. For the purposes of drain cleaning activities described in § 1301.002(2) of the Plumbing License

Law [2(12) of the Act], a p-trap includes any integral trap of a water closet, bidet, or urinal.

(44) Public Water System--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals, but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater, at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if the individual lives in, uses as the individual's place of employment, or works in a place to which drinking water is supplied from the water system.

(45) Regularly Employed--Steadily, uniformly, or habitually working in an employer-employee relationship with a view of earning a livelihood, as opposed to working casually or occasionally.

(46) Residential Utilities Installer--means an individual who has completed at least 2,000 hours working under the supervision of a Master Plumber as a registered Plumber's Apprentice, who has fulfilled the requirements of and is registered with the Board, and who constructs and installs yard water service piping for one-family or two-family dwellings and building sewers.

(47) Respondent--A person charged in a complaint filed with the Board.

(48) Responsible Master Plumber--A Responsible Master Plumber is the Master Plumber who allows his Master Plumber License to be used by a company for the purpose of performing plumbing work and obtaining the required plumbing permits. The Master Plumber by allowing his license to be used in this manner, assumes responsibility for all plumbing work performed. A Responsible Master Plumber may allow his Master Plumber License to be used by only one plumbing company.

(49) Rule--An agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the agency. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the agency and not affecting private rights or procedures.

(50) Supervision--the general on-the-job or off-the-job oversight, direction and management of plumbing work and individuals performing plumbing work by a Responsible Master Plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(A) that the operations of the plumbing company that has secured his or her services meets the requirements of all applicable local and state ordinances, regulations and laws; and

(B) that the plumbing work performed under his or her License will protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(51) System--An interconnection between one or more public or private end users of water, gas, sewer, or disposal systems that could endanger public health if improperly installed.

(52) Tradesman Plumber-Limited Licensee--means an individual who has completed at least 4,000 hours working under the

direct supervision of a Journeyman or Master Plumber as a registered Plumber's Apprentice, who has passed the required examination and fulfilled the other requirements of the Board, who constructs and installs plumbing for one-family or two-family dwellings, and who has not met or attempted to meet the qualifications for a Journeyman Plumber License.

(53) Two Family Dwelling--a detached structure with separate means of egress designed for the residence of two families ("duplex") that does not have the characteristics of a multiple family dwelling and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(54) Water Supply Protection Specialist--a Master or Journeyman Plumber who holds the Water Supply Protection Specialist Endorsement issued by the Board.

(55) Water Treatment--A business conducted under contract that requires experience in the analysis of water, including the ability to determine how to treat influent and effluent water, to alter or purify water, and to add or remove a mineral, chemical, or bacterial content or substance. The term also includes the installation and service of potable water treatment equipment in public or private water systems and making connections necessary to complete installation of a water treatment system.

(56) Work as a Master Plumber--To act as and assume the responsibilities of a Responsible Master Plumber, as defined in these Rules.

(57) Yard Water Service Piping--The building supply piping carrying potable water from the water meter or other source of water supply to the point of connection to the water distribution system at the building.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403082

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145



## 22 TAC §361.6

The Texas State Board of Plumbing Examiners proposes amendments to §361.6, which specifies certain fees charged by the Board, including the fees for initial applications for licenses, endorsements, and registrations as well as examination fees.

The proposed amendments to §361.6 are in compliance with Senate Bill 1152 (78th Legislature, Regular Session) which requires state occupational licensing agencies, including the Texas State Board of Plumbing Examiners, to collect original application and initial license, endorsement and registration fees to pay for the development and use of "Texas Online", a state web site for electronic occupational license transactions. The Texas Online Authority has advised the Board that the online original applications for licenses and registrations will be implemented by September 1, 2004. The Texas Online Authority is requiring the Board to begin collecting the additional fees on September 1,

2004. The original license and registration fees that were set by the Texas Online Authority are:

Master Plumber initial license fee to increase by \$5 (from \$175 to \$180)

Journeyman Plumber initial license fee to increase by \$2 (from \$25 to \$27)

Medical gas installation endorsement (Master) initial fee to increase by \$5 (from \$50 to \$55)

Medical gas installation endorsement (Journeyman) initial fee to increase by \$2 (from \$12 to \$14)

Plumbing Inspector initial license fee to increase by \$5 (from \$50 to \$55)

Water supply protection specialist endorsement (Journeyman) initial fee to increase by \$2 (from \$12 to \$14)

Water supply protection specialist endorsement (Master) initial fee to increase by \$5 (from \$50 to \$55)

Tradesman Plumber-Limited License initial license fee to increase by \$2 (from \$25 to \$27)

Plumber's Apprentice Registration application and initial registration fee to increase by \$2 (from \$10 to \$12)

Residential Utilities Installer Registration application and initial registration fee to increase by \$2 (from \$10 to \$12)

Drain Cleaner Registration application and initial registration fee to increase by \$2 (from \$10 to \$12)

Drain Cleaner-Restricted Registration application and initial registration fee to increase by \$2 (from \$10 to \$12)

Master Plumber examination fee to increase by \$5 (from \$150 to \$155)

Journeyman Plumber examination fee to increase by \$2 (from \$25 to \$27)

Medical gas installation endorsement (Master) examination fee to increase by \$5 (from \$75 to \$80)

Medical gas installation endorsement (Journeyman) examination fee to increase by \$2 (from \$25 to \$27)

Plumbing inspector examination fee to increase by \$5 (from \$50 to \$55)

Water supply protection specialist endorsement (Journeyman) examination fee to increase by \$2 (from \$25 to \$27)

Water supply protection specialist endorsement (Master) examination fee to increase by \$5 (from \$75 to \$80)

Tradesman Plumber-Limited License examination fee to increase by \$2 (from \$25 to \$27)

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that there will be a fiscal impact for persons required to comply with these rule amendments. For the first five-year period that the rules are in effect, persons who submit applications for the following examination or initial license, endorsement or registration will pay increased fees in the following amounts:

Master Plumber initial license \$25

Journeyman Plumber initial license \$10

Medical gas installation endorsement (Master) initial endorsement \$25

Medical gas installation endorsement (Journeyman) initial endorsement \$10

Plumbing Inspector initial license \$25

Water supply protection specialist endorsement (Journeyman) initial endorsement \$10

Water supply protection specialist endorsement (Master) initial endorsement \$25

Tradesman Plumber-Limited License initial license \$10

Plumber's Apprentice Registration application and initial registration \$10

Residential Utilities Installer Registration application and initial registration \$10

Drain Cleaner Registration application and initial registration \$10

Drain Cleaner-Restricted Registration application and initial registration \$10

Master Plumber examination \$25

Journeyman Plumber examination \$10

Medical gas installation endorsement (Master) examination \$25

Medical gas installation endorsement (Journeyman) examination \$10

Plumbing inspector examination \$25

Water supply protection specialist endorsement (Journeyman) examination \$10

Water supply protection specialist endorsement (Master) examination \$25

Tradesman Plumber-Limited License examination \$10

Mr. Maxwell has also determined that each year of the first five years the rules are in effect there should be no mandated fiscal impact on local government or state government as well as small businesses. Any local governments or small businesses that choose to pay the fees for any of their employees who hold a license or registration will be impacted by the amount of the fee increases. Neither local governments nor small businesses are required by state law or this rule to pay the fees of their employees. The public benefit anticipated as a result of enforcing these rules will be the ability for individuals to apply for original licenses, endorsements and registrations described above using the Internet and paying with a credit card. The Board will also expend fewer resources processing applications, which will allow the Board to use the saved resources to provide better customer service to the public and all of its licensees and registrants.

Comments on the proposed rule changes may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §361.6 are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §1301.251, §1301.253 the rule it amends and Senate Bill 1152 (78th Legislature, Regular Session). Section 1301.251 requires the Board

to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.253 requires the Board to set fee amounts that are reasonable and necessary to cover the costs of administering the Act, Senate Bill 1152 (78th Legislature, Regular Session) requires state occupational licensing agencies, including the Texas State Board of Plumbing Examiners, to collect original application and initial license, endorsement and registration fees to pay for the development and use of "Texas Online", a state web site for electronic occupational license transactions.

No other statute, article or code is affected by this proposed amendment. The proposed amendment has been reviewed by legal counsel and found to be within the state agency's authority to adopt.

*§361.6. Fees.*

(a) The Board has established the following fees:

(1) Initial Licenses, Endorsements and Registrations

(A) Master Plumber license--~~\$180~~; [~~\$175~~]

(B) Journeyman Plumber license--~~\$27~~; [~~\$25~~]

(C) Medical gas installation endorsement (Master)--~~\$55~~; [~~\$50~~]

(D) Medical gas installation endorsement (Journeyman)--~~\$14~~; [~~\$12~~]

(E) Plumbing inspector license--~~\$55~~; [~~\$50~~]

(F) Water supply protection specialist endorsement (Journeyman)--~~\$14~~; [~~\$12~~]

(G) Water supply protection specialist endorsement (Master)--~~\$55~~; [~~\$50~~]

(H) Tradesman Plumber-Limited License--~~\$27~~; [~~\$25~~]

(I) Plumber's Apprentice Registration/Application--~~\$12~~; [~~\$10~~]

(J) Residential Utilities Installer Registration/Application--~~\$12~~; [~~\$10~~]

(K) Drain Cleaner Registration/Application--~~\$12~~; [~~\$10~~]

(L) Drain Cleaner-Restricted Registration/Application--~~\$12~~; [~~\$10~~]

(2) Examinations

(A) Master Plumber examination--~~\$155~~; [~~\$150~~]

(B) Journeyman Plumber examination--~~\$27~~; [~~\$25~~]

(C) Medical gas installation endorsement (Master)--~~\$80~~; [~~\$75~~]

(D) Medical gas installation endorsement (Journeyman)--~~\$27~~; [~~\$25~~]

(E) Plumbing inspector examination--~~\$55~~; [~~\$50~~]

(F) Water supply protection specialist endorsement (Journeyman)--~~\$27~~; [~~\$25~~]

(G) Water supply protection specialist endorsement (Master)--~~\$80~~; [~~\$75~~]

(H) Tradesman Plumber-Limited Licensee--~~\$27~~; [~~\$25~~]

(3) Renewals



- (A) Master Plumber license--\$180;
  - (B) Journeyman Plumber license--\$27;
  - (C) Medical gas installation endorsement (Master)--\$55;
  - (D) Medical gas installation endorsement (Journeyman)--\$14;
  - (E) Plumbing inspector license--\$55;
  - (F) Water supply protection specialist endorsement (Journeyman)--\$14;
  - (G) Water supply protection specialist endorsement (Master)--\$55;
  - (H) Plumbing Inspector with a Master and/or Journeyman License--\$55;
  - (I) Master Plumber with Journeyman Plumber License--\$180;
  - (J) Tradesman Plumber-Limited License--\$27;
  - (K) Plumber's Apprentice Registration--\$12;
  - (L) Residential Utilities Installer Registration-- \$12;
  - (M) Drain Cleaner Registration--\$12;
  - (N) Drain Cleaner-Restricted Registration--\$12.
- (4) Other fees
- (A) Late renewal
    - (i) Master Plumber:
      - (I) less than 90 days--one-half renewal fee--\$90;
      - (II) more than 90 days-- renewal fee--\$180;
    - (ii) Medical gas installation endorsement (Master):
      - (I) less than 90 days--one half renewal fee--\$27.50;
      - (II) more than 90 days-- renewal fee--\$55;
    - (iii) Medical gas installation endorsement (Journeyman):
      - (I) less than 90 days--one half renewal fee--\$7;
      - (II) more than 90 days--renewal fee--\$14;
    - (iv) Journeyman Plumber:
      - (I) less than 90 days--one-half renewal fee--\$13.50;
      - (II) more than 90 days--renewal fee--\$27;
    - (v) Water supply protection specialist (Journeyman):
      - (I) less than 90 days--one half renewal fee--\$7;
      - (II) more than 90 days-- renewal fee--\$14;
    - (vi) Water supply protection specialist (Master):
      - (I) less than 90 days--one half renewal fee--\$27.50;
      - (II) more than 90 days--renewal fee--\$55;
    - (vii) Plumbing Inspector:
      - (I) less than 90 days--one half renewal fee--\$27.50;
      - (II) more than 90 days-- renewal fee--\$55;
    - (viii) Master Plumber with Journeyman Plumber:
      - (I) less than 90 days--one half renewal fee--\$90;
      - (II) more than 90 days-- renewal fee--\$180;
    - (ix) Plumbing Inspector with Master and/or Journeyman Plumber:
      - (I) less than 90 days--one half renewal fee--\$27.50;
      - (II) more than 90 days-- renewal fee--\$55;
    - (x) Tradesman Plumber-Limited License:
      - (I) less than 90 days--one half renewal fee--\$13.50;
      - (II) more than 90 days--renewal fee--\$27;
    - (xi) Plumber's Apprentice Registration:
      - (I) less than 90 days--one half renewal fee--\$6;
      - (II) more than 90 days--renewal fee--\$12;
    - (xii) Residential Utilities Installer Registration:
      - (I) less than 90 days--one half renewal fee--\$6;
      - (II) more than 90 days-- renewal fee--\$12;
    - (xiii) Drain Cleaner Registration:
      - (I) less than 90 days--one half renewal fee--\$6;
      - (II) more than 90 days-- renewal fee--\$12;
    - (xiv) Drain Cleaner-Restricted Registration :
      - (I) less than 90 days--one half renewal fee--\$6;
      - (II) more than 90 days-- renewal fee--\$12.
  - (B) Instructor Certification Training (Per Day)--\$100.
  - (C) Duplicate license or registration--\$10.
  - (D) Returned check--\$25.
- (b) Methods of payment
- (1) Fees paid electronically through the Texas Online website, which may be accessed from the Texas State Board of Plumbing Examiners' website, may be made in the form of credit card or check.
  - (2) Fees paid by mail or in person may be made in the form of money order, cashier's check, personal check, business check, or the exact amount of cash (cash payments by mail are not recommended).
  - (3) An individual shall pay the appropriate fee prior to the time of examination. For License, Registration, Endorsement, and renewal, the appropriate fee shall be paid prior to issuance of the License, Registration, Endorsement, or renewal.
  - (4) The board, under any special circumstances it finds appropriate, may:
    - (A) waive any requirements concerning the method or timing of payment of any fee;
    - (B) refund any fee; or
    - (C) waive payment of any fee not required by statute.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403083

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145



## SUBCHAPTER B. PETITION FOR ADOPTION OF RULES

### 22 TAC §§361.22 - 361.24, 361.26, 361.27

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Plumbing Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas State Board of Plumbing Examiners proposes the repeal of §§361.22 - 361.24, 361.26 and 361.27 which set forth procedures for complaint investigations and referring contested cases to the State Office of Administrative Hearings.

The repeals are necessary since the rules do not completely reflect the changes made to Title 8, Chapter 1301, Occupations Code (Plumbing License Law), during the 78th Legislative Regular Session. The repeal of the rules is proposed in conjunction with the proposal of new rules under Board Rules Chapter 367, which more completely set forth procedures for the Board and its staff to follow from complaint investigations through the contested case hearings under the requirements of the Plumbing License Law and Administrative Procedure Act. The proposed new rules are §§367.8 - 367.14.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal impact on state and local government as well as small businesses and persons as a result of the repeal of these rules.

Mr. Maxwell also has anticipated that each year of the first five years the repeal of the rules are in effect, the public will benefit as a result of repealing these rules in conjunction with the adoption of the new, more complete rules under Chapter 367. The anticipated benefit is the protection of the public health, safety and welfare through fair and equitable enforcement of the Plumbing License Law.

Comments on the proposed rule repeals may be submitted within 30 days of publication of these proposed rule repeals in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The repeals are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §§1301.251, 1301.303, 1301.451, 1301.502, 1301.504, 1301.5045, 1301.5071, Subchapter N of Chapter 1301, Occupations Code and Chapter 367 of the Board Rules. Section 1301.251 requires the Board to

adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.303 sets forth requirements for complaint investigations. Section 1301.451 sets forth the disciplinary powers of the Board. Section 1301.502 authorizes the issuance of citations according to guidelines adopted by the Board. §1301.504 authorizes the filing of injunctions. Section 1301.5045 authorizes the issuance of cease and desist orders. Section 1301.5071 requires the Board to adopt procedures for conducting informal conferences and authorizes the Board to order restitution. Subchapter N authorizes the Board to impose administrative penalties, sets general procedures for the imposition and collection of the administrative penalties, hearings and appeals. Board Rules Chapter 367 provides for enforcement of the Plumbing License Law, standards of conduct and requirements for licensees and registrants of the Board and persons offering to perform plumbing work and plumbing companies. The repeal of the rules are also proposed under the authority of Texas Government Code, Chapter 2001 (Administrative Procedure Act).

No other statute, article or code is affected by this proposal.

§361.22. *Contested Cases: Hearings.*

§361.23. *Contested Cases: Notice of Hearing.*

§361.24. *Contested Cases: Record of Hearing.*

§361.26. *Contested Cases: Investigations.*

§361.27. *Rules of Practice and Procedure.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403089

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145



## SUBCHAPTER C. ELECTION OF BOARD OFFICERS

### 22 TAC §361.29

The Texas State Board of Plumbing Examiners proposes amendments to Board rule §361.29, which provides for the election of officers to the Texas State Board of Plumbing Examiners (Board). The rule requires the Board to elect a chairperson, vice-chairperson and secretary.

The proposed amendments to §361.29 are necessary due to amendments made during the 78th Legislative Regular Session to the Plumbing License Law (Title 8, Chapter 1301, Occupations Code), which state that the governor may appoint the Board's presiding officer and that the Board may only elect a secretary.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal impact on state and local government as well as small businesses and persons required to comply with these rules amendments.

Mr. Maxwell also has determined that each year of the first five years the rules are effect the public benefit anticipated as a result of enforcing these rules will be that the Board's rules will not be in conflict with the Plumbing License Law.

Comments on the proposed rule changes may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §361.29 are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §1301.251, §1301.157 and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.157 states that the governor may appoint the Board's presiding officer and that the Board may only elect a secretary.

No other statute, article or code is affected by this proposed amendment. The proposed amendment has been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§361.29. ~~[Election of]~~ Board Officers.

(a) The governor shall designate a member of the board as the presiding officer of the Board to serve in that capacity at the pleasure of the governor.

(b) The Board shall elect a secretary from its membership.

(1) The election may be held every two years during the July Board meeting.

(2) The elected Board Secretary shall take office on the first day of September following the election held at the July Board meeting.

(3) If the office becomes vacant for any reason, a special election shall be held at the next regularly scheduled Board meeting to fill the office for the unexpired term. [Beginning with the July 1997 Board meeting, the Board shall formally elect a Chairman, Vice-Chairman, and Secretary. Elections will be held every two years. The elected Board officers will take office on the first day of September following the elections held at the July Board meeting. Each elected Board officer shall serve a two-year term. If an office becomes vacant for any reason, a special election will be held at the next regularly scheduled board meeting to fill the office for the unexpired term.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403084

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145



## CHAPTER 365. LICENSING AND REGISTRATION

### 22 TAC §365.14

The Texas State Board of Plumbing Examiners (Board) proposes amendments to Board rule §365.14, which provides for the Board's recognition, approval and administration of Continuing Professional Education (CPE) programs.

The proposed amendments to §365.14 will change the dates of submission of CPE Course Materials to the Board for its review and possible approval, to allow additional time for Course Material Providers to prepare the drafts of the Course Materials.

The proposed amendments to §365.14 will also clarify that Board registration forms must be included in Course Materials approved by the Board.

Additionally, the proposed amendments to §365.14 will clarify that a Course Instructors shall not allow CPE credit for an individual who does not receive six contact teaching hours of CPE, excluding any breaks from the teaching of CPE.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal impact on state and local government as well as small businesses and persons required to comply with these rules amendments.

Mr. Maxwell also has determined that each year of the first five years the rules are effect the public benefit anticipated as a result of enforcing these rules will be better CPE for licensed plumbers and plumbing inspectors. Public health and safety will benefit from licensed plumbers and plumbing inspectors receiving quality CPE each year, in order to renew their licenses.

Comments on the proposed rule changes may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §365.14 are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §1301.251, §1301.404 and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.404 requires the Board to recognize, approve and administer CPE for licensees.

No other statute, article or code is affected by this proposed amendment. The proposed amendment has been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§365.14. *Continuing Professional Education Programs.*

(a) Course Materials--Beginning in preparation for the 2000-2001 Continuing Professional Education year (begins on July 1, 2000), the Board will annually approve Course Materials to be used for the Continuing Professional Education (CPE) required for renewal of Journeyman Plumber, Master Plumber, Tradesman Plumber-Limited Licensee and Plumbing Inspector Licenses. The Course Materials are the printed materials that are the basis for a substantial portion of a CPE course and which are provided to the Licensees. Board approval of Course Materials will be subject to all of the terms and conditions of this Section. The following minimum criteria will be used by the Board in considering approval of Course Materials:

(1) The Course Materials will provide the basis for a minimum of six classroom hours of study. Three of the six hours will be in the subjects of health protection, energy conservation and water conservation, with the remaining three hours covering subjects which shall include information concerning the Act, Board Rules, current industry

practices and codes, and subjects from lists of approved subjects published by the Board.

(2) The Board will periodically publish lists of approved subjects.

(3) The Course Materials must be presentations of relevant issues and changes within the subject areas as they apply to the plumbing practice in the current market or topics which increase or support the Licensee's development of skill and competence.

(4) The provider of the Course Materials must provide the Course Materials, as needed, in correspondence course form to comply with §12B(d) of the Act, which are to be made available for at least three (3) years or as necessary for renewal of an expired license.

(5) The Course Materials may not advertise or promote the sale of goods, products or services.

(6) The Course Materials must be printed and bound and must meet the following minimum technical specifications for printing and production:

- (A) Binding - Perfect or Metal Coiled,
- (B) Ink - Full Bleed Color,
- (C) Cover Material - 80 Pound Gloss Paper,
- (D) Page Material - 70 Pound

(7) The Course Materials will include perforated Board forms within the binding of the Course Materials that may be removed for use by the Licensees. The forms will include CPE evaluation forms, License and Endorsement examination forms, registration forms and General Complaint forms.

(8) All Course Materials must have the following characteristics:

- (A) Correct grammar, spelling and punctuation,
- (B) Appropriate illustrations and graphics to show concepts not easily explained in words, and
- (C) In depth and comprehensive presentation of subject matter which increases or supports the skills or competence of the Licensees.

(9) The provider of Course materials must have legal ownership of or an appropriate license for the use of all copyrighted material included within the Course materials. Board approved Course materials will contain a prominently displayed approval statement in 10 point bold type or larger containing the following language: "THIS CONTINUING PROFESSIONAL EDUCATION COURSE MATERIAL HAS BEEN APPROVED BY THE TEXAS STATE BOARD OF PLUMBING EXAMINERS FOR USE IN THE (state year) CPE YEAR. BY ITS APPROVAL OF THIS COURSE MATERIAL, THE TEXAS STATE BOARD OF PLUMBING EXAMINERS DOES NOT ASSUME ANY RESPONSIBILITY FOR THE ACCURACY OF THE CONTENTS OF THE COURSE MATERIAL. FURTHER, THE TEXAS STATE BOARD OF PLUMBING EXAMINERS IS NOT MAKING ANY DETERMINATION THAT THE PARTY PUBLISHING THE COURSE MATERIALS HAS COMPLIED WITH ANY APPLICABLE COPYRIGHT AND OTHER LAWS IN PUBLISHING THE COURSE MATERIAL AND THE TEXAS STATE BOARD OF PLUMBING EXAMINERS DOES NOT ASSUME ANY LIABILITY OR RESPONSIBILITY THEREFOR. THE COURSE MATERIAL IS NOT BEING PUBLISHED BY NOR IS IT A PUBLICATION OF THE TEXAS STATE BOARD OF PLUMBING EXAMINERS."

(10) The provider of Course Materials will conduct instructor training in the use of Course Materials.

(11) The provider of Course Materials will be required to have distribution facilities that will ensure prompt distribution of course materials, facsimile ordering and a statewide toll free telephone number for placing orders. The provider of Course Materials must ship any ordered material within ten business days after the receipt of the order and payment for the course materials.

(12) The Board shall annually approve only individuals, businesses or associations to provide Course Materials. Any individual, business or association who wishes to offer to provide Course Materials shall apply to the Board for approval using application forms prepared by the Board. In order to be approved, the application must satisfy the Board as to the ability of the individual, business or association to provide quality Course Materials as required in this Section and must include:

- (A) name and address of individual applicant,
- (B) names and addresses of all officers, directors, trustees or members of the governing board of any business or association applicant,
- (C) statement by individual applicant, and each officer, director, trustee or member of governing board as to whether he or she has ever been convicted of a felony or misdemeanor other than a minor traffic violation,
- (D) certificate of good standing issued by the Texas Comptroller of Public Accounts for business or association applicants,
- (E) fees to be charged for Course Materials,
- (F) taxpayer identification number,

(13) The provider of Course Materials must sell Course Materials to all Course Providers and Licensees at the same price as stated in the application.

(14) The Board may refuse to accept any application for approval as a provider of Course Materials that is not complete. The Board may deny approval of an application for any of the following reasons:

- (A) failure to comply with the provisions of this section;
- (B) inadequate coverage of the materials required to be included in Course Materials; or
- (C) unsatisfactory evaluations of the Course Materials by Course Providers, Instructors, Licensees, or Board staff.

(15) If an application is refused or disapproved, written notice detailing the basis of the decision shall be provided to the applicant.

(16) A provider's authority to offer the Course Materials for which CPE credit is given expires on June 30 of the following calendar year after approval.

(17) All providers of Course Materials must meet the following time schedule each year for approval of Course Materials [~~to be used for the 2002-2003 CPE years~~]:

(A) At least 15 [~~20~~] copies each of the [~~final~~] draft version of the Course Materials must be submitted to the Board's office no later than November 15 [~~December 1~~] for Board approval at its January Board meeting.

(B) At least 15 [~~20~~] copies each of the revised [~~and completed~~] version of the Course Materials must be submitted to the

Board's office no later than March 15 [4], for Board approval at its April Board meeting.

(C) At least 15 [50] copies each of all Course Materials that are approved at the Board's April Board meeting shall be provided to the Board's office in completed form no later than July 1 at no cost to the Board.

[(18) All providers of Course Materials must meet the following time schedule each year for approval of Course Materials to be used for the 2003-2004 and following CPE years:]

[(A) At least 20 copies each of the final draft version of the Course Materials must be submitted to the Board's office no later than September 1, for Board approval at its January Board meeting.]

[(B) At least 20 copies each of the revised and completed version of the Course Materials must be submitted to the Board's office no later than March 1, for Board approval at its April Board meeting.]

[(C) At least 50 copies each of all Course Materials that are approved at the Board's April Board meeting shall be provided to the Board's office no later than July 1 at no cost to the Board.]

(18) [(19)] A provider's failure to comply with this section constitutes grounds for disciplinary action against the provider or for disapproval of future applications for approval as a provider of Course Materials.

(b) Course Providers--The Board will annually approve only individuals, businesses or associations as Course Providers. Course Providers will offer classroom and correspondence instruction in the Course Materials used for the Continuing Professional Education (CPE) required for renewal of all licenses issued under the Act. Board approval of Course Providers will be subject to all of the terms and conditions of this Section. The following minimum criteria will be used by the Board in considering approval of Course Providers:

(1) CPE courses shall be presented in one of the following formats:

(A) Six classroom hours presented on one day

(B) Two sessions of three classroom hours each presented within a seven day period or

(C) An approved correspondence course.

(2) Not less than three hours of the classroom course will be in the subjects of health protection, energy conservation and water conservation.

(3) Presentations must be based primarily on the Course Materials and any other materials approved by the Board.

(4) In addition to Course Materials, presentations may include videos, films, slides or other appropriate types of illustrations and graphic materials related to the Course Materials.

(5) Course Providers shall limit the number of students for any CPE class to forty-five (45).

(6) A Course Provider may not advertise or promote the sale of any goods, products or services between the opening and closing hours of any CPE class.

(7) Each Course Provider shall furnish a uniquely numbered Certificate of Completion of CPE to each Licensee, but only after the licensee has completed the CPE course. The Board will assign the unique numbers to be used on each Certificate to each Course Provider.

(8) Each Course Provider shall, at its own expense and in a format approved by the Board, electronically transmit to the Board certification of each Licensee's completion of CPE requirements within forty-eight hours of completion.

(A) The Board may provide training to the Course Provider in the method for electronic transmittal.

(B) The Board may charge a fee to recover its costs for computer software and training in the use of the software to the Course Provider.

(9) Each Course Provider shall be reviewed annually by the Board to ensure that classes have been provided equitably across the state of Texas, except as provided in §365.14(b)(15)(J).

(10) Each Course Provider must notify the Board at least 7 days before conducting classes; the notice shall contain the time(s) and place(s) where the classes will occur.

(11) Each Course Provider will perform self-monitoring and reporting as required by the Board.

(12) Each Course Provider shall use only Course Instructors that have been approved by the Board. Each Course Provider shall annually submit to the Board's office a list of Course Instructors it employs and the instructors' credentials for approval. Initial lists of Course Instructors, to be approved for the 2002-2003 and later CPE years, must be submitted each year no later than March 15 for approval by the Board at its April Board meeting. The Board may approve additional Course Instructors at any regularly scheduled Board meeting.

(13) Prior to allowing Course Instructors to teach CPE, Course Providers must provide documentation to the Board showing the instructor's successful completion of Course Materials training.

(14) Course Instructors must comply with subsection [Section] (c) of this Section. Course Providers shall notify the Board within 10 days of any change of an instructor's employment status with the Course Provider.

(15) Any individual, business or association who wishes to be a Course Provider shall apply to the Board for approval using application forms prepared by the Board. In order to be approved, the application must satisfy the Board as to the ability of the individual, business or association to provide quality instruction in the Course Materials as required in this Section and must include:

(A) name and address of individual applicant,

(B) names and addresses of all officers, directors, trustees or members of the governing board of any business or association applicant,

(C) statement by individual applicant, and each officer, director, trustee or member of governing board as to whether he or she has ever been convicted of a felony or misdemeanor other than a minor traffic violation,

(D) certificate of good standing issued by the Texas Comptroller of Public Accounts for business or association applicants,

(E) taxpayer identification number,

(F) facsimile number, statewide toll free telephone number, Internet web site or electronic mail address,

(G) fees to be charged to Licensees for attending the course, considering the following:

(i) If the Course Provider is not also a provider of Course Materials and will purchase Course Materials, the Course

Provider may not charge the Licensees more than its actual cost for the Course Materials supplied to the Licensees by the Course Provider.

(ii) The fees charged to the Licensees for attending the course will be determined by the Course Provider.

(H) an example of a Licensee's Certificate of Completion of CPE,

(I) CPE class scheduling plan,

(J) plan for providing courses equitably across the state (the following individuals or businesses will not have to comply with this subparagraph:

(i) Employers applying to be approved as Course Providers for the purpose of providing CPE courses only to the employers' employees, and

(ii) Individuals who will not employ Course Instructors other than themselves),

(K) method for reporting compilations of Licensee evaluations of Course Materials, Course Provider and Course Instructors to the Board, in accordance with the following:

(i) Course Providers shall provide quarterly reports no later than December 15, March 15, June 15 and September 15, for the first year in which the Course Provider provides CPE courses;

(ii) Renewing Course Providers shall provide only annual reports, no later than September 15 of each year, for the preceding CPE course year.

(L) method for ensuring that only Licensees who meet one or more of the following requirements may receive CPE credit for taking an CPE correspondence course:

(i) any Licensee that lives outside of the State of Texas, or

(ii) lives in a county that does not have a city with a population in excess of 100,000, or

(iii) who has an expired license that requires a CPE course that is no longer available in the classroom, or

(iv) who submits written proof to the Board from a physician stating the medical reason that the licensee is unable to attend a CPE class;

(M) identification of the Course Materials which will be used by the Course Provider.

(16) The Board may refuse to accept any application for approval as a Course Provider that is not complete. The Board may deny approval of an application for any of the following reasons:

(A) failure to comply with the provisions of this section;

(B) inadequate instruction of the materials required to be included in Course Materials; or

(C) unsatisfactory evaluations of the Course Provider by Licensees or Board staff.

(17) If an application is refused or disapproved, written notice detailing the basis of the decision shall be provided to the applicant.

(18) A Course Provider's authority to offer instruction in the Course Materials for which CPE credit is given expires on June 30, of the following calendar year after approval.

(19) Beginning with the 2000-2001 CPE year, the Board will establish the deadline in which applications must be submitted after the effective date of this rule. For the 2001-2002 and following CPE years, all Course Provider applications must be submitted to the Board office no later than December 1, each year for approval at the Board's January meeting.

(20) The Board shall review Course Providers for quality in instruction. The Board shall also investigate and take appropriate action, up to and including revocation of authority to provide CPE, regarding complaints involving approved Course Providers.

(21) A provider's failure to comply with this section constitutes grounds for disciplinary action, up to and including revocation of authority to provide CPE, against the provider or for denial of future applications for approval as a Course Provider.

(c) Course Instructors- The Board will annually approve Course Instructors to provide the classroom instruction in the Course Materials used for the Continuing Professional Education (CPE) required for renewal of Journeyman Plumber, Master Plumber, Tradesman Plumber-Limited Licensee and Plumbing Inspector Licenses. Board approval of Course Instructors will be subject to all of the terms and conditions of this Section. An individual who wishes to be approved by the Board as a Course Instructor must apply to the Board using an application form approved by the Board. The following minimum criteria will be used by the Board in considering approval of Course Instructors:

(1) Instructors must be licensees of the Board and attend and successfully complete a Course Instructor Certification Workshop each year conducted by the Board (the Board will charge a fee to recover its costs for conducting the Course Instructor Certification Workshop).

(2) Instructors will be required to successfully complete a Board approved program of 160 clock hours which meets the following criteria. The Board will allow credit for approved courses.

(A) 40 hours to provide the Instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs.

(B) 40 hours to provide the Instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs.

(C) 40 hours to provide the Instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community.

(D) 40 hours to provide the Instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.

(E) To maintain his/her status as an approved Course Instructor, the Instructor shall undergo one of the aforementioned training programs every 12 months such that the entire training (160 hours) is complete within four years.

(3) A Course Instructor may not advertise or promote the sale of goods, products, or services between the opening and closing hours of any CPE class.

(4) As a Course Instructor and Licensee of the Board, a Course Instructor must comply with the Plumbing License Law and Board Rules, including §367.2 of the Board Rules regarding Standards of Conduct. An Instructor has a responsibility to his students and employer to:

(A) be well versed in and knowledgeable of the Course Materials,

(B) maintain an orderly and professional classroom environment, ~~and~~

(C) ensure that only students who receive six contact hours of instruction (excluding any time spent on breaks from instruction) receive credit for attending the CPE class, and;

(D) ~~[(E)]~~ coordinate with the Course Provider to develop an appropriate method for handling disorderly and disruptive students. A Course Instructor shall report to the Course Provider and the Board, any non-responsive and disruptive student who attends a CPE course. The Board may deny CPE credit to any such student and require, at the student's expense, successful completion of an additional CPE course to receive credit.

(5) The Board shall review Course Instructors for quality of instruction. The Board shall also respond to complaints regarding Course Instructors.

(6) A Course Instructor's failure to comply with this section constitutes grounds for disciplinary action against the Instructor or for disapproval of future applications for approval as a Course Instructor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403085

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145



## CHAPTER 367. ENFORCEMENT

### 22 TAC §367.1

The Texas State Board of Plumbing Examiners (Board) proposes amendments to §367.1, which generally states laws and rules which must be complied with by licensees, registrants, individuals and companies involved in the installation of plumbing. The rule also sets forth authority for enforcement of the Plumbing License Law, Board Rules and plumbing codes.

The proposed amendments are necessary due to the codification of the Plumbing License Law (Law) during the 78th Legislative Regular Session, moving the Law from Vernon's Civil Statutes, Article 6243-101 to Title 8, Chapter 1301, Occupations Code. A reference in the rule made to a section of Vernon's Civil Statutes, Article 6243-101 is proposed to be changed to a reference in Chapter 1301 of the Occupations Code.

The proposed amendments are also necessary due to the passage of HB 2661 during the 78th Legislative Regular Session, which provides the Texas Commission on Environmental Quality with rule making authority regarding the use and reuse of graywater. HB 2661 removed authority from the Texas State Board of Plumbing Examiners to promulgate greywater rules. The proposed amendments to §367.1 will reflect the change made by HB 2661.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal impact on state and local government as well as small businesses and persons required to comply with the amendments.

Mr. Maxwell also has determined that each year of the first five years the rule is effect the public benefit anticipated as a result of enforcing the rule will be that the Board Rule will not be in conflict with state law.

Comments on the proposed rule changes may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §1301.251, HB 2661 (78th Legislative Regular Session) and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. HB 2661 removed authority from the Texas State Board of Plumbing Examiners to promulgate greywater rules.

No other statute, article or code is affected by this proposed amendment.

#### §367.1. General Provisions.

(a) - (h) (No change.)

(i) Plumbing installed in compliance with a code adopted under subsection (e), (f), or (h) of this section must be inspected by a plumbing inspector. To perform this inspection, the political subdivision may contract with any plumbing inspector paid directly by the political subdivision. The plumbing inspector must be licensed as required by §§1301.255(e), 1301.351(b) and 1301.551 of the Plumbing License Law ~~[Section 14(a) of the Act ]~~.

(j) (No change.)

~~[(k) New construction of a graywater system or modification to an existing graywater system must be carried out in accordance with the rules of the Texas State Board of Plumbing Examiners and the Texas Natural Resource Conservation Commission.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403086

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145



### 22 TAC §367.3

The Texas State Board of Plumbing Examiners (Board) proposes amendments to §367.3, which provides certain requirements for plumbing companies and Responsible Master Plumbers.

The proposed amendments to §367.3 are proposed in conjunction with the repeal of §361.26. The proposed amendments will relocate some of the language contained in §361.26 to §367.3,

without adding any additional requirements that plumbing companies and Responsible Master Plumbers must currently abide by. The proposed relocated language specifies that Responsible Master Plumbers must include the Board's name, mailing address, telephone number and the Responsible Master Plumber's license number on each written contract.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal impact on state and local government and no additional impact to small businesses and persons required to comply with these current requirements.

Mr. Maxwell also has determined that each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the citizens health, safety and welfare will continue to be protected by the citizens ability to know how to contact the agency that regulates plumbing, when the citizens contract with plumbers for plumbing work.

Comments on the proposed rule changes may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §1301.251, §1301.302 and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.302 requires a licensed plumber to include the Board's contact information on written contracts for plumbing services.

No other statute, article or code is affected by this proposed amendment.

*§367.3. Requirements for Plumbing Companies, Responsible Master Plumbers; Certificate of Insurance.*

(a) A company or person offering to do plumbing work must secure the services of at least one Responsible Master Plumber holding a current Master Plumber License.

(1) - (8) (No change.)

(9) Each written contract for plumbing services by the licensed Responsible Master Plumber shall contain the Responsible Master Plumber's License number, the Board's name, mailing address and telephone number. The term "written contract" includes documents used by a plumber or plumbing company to define the scope and cost of the work to be provided to the public. This would include items such as service invoices, billing invoices or any document which defines the services and cost of the services provided to the consumer. For the purposes of this section, the public need not sign the document for it to be considered a contract.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403087

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145

## 22 TAC §§367.8 - 367.14

The Texas State Board of Plumbing Examiners (Board) proposes new §§367.8 - 367.14, which provides for enforcement of Title 8, Chapter 1301, Occupations Code (Plumbing License Law), standards of conduct and requirements for licensees and registrants of the Board and persons offering to perform plumbing work and plumbing companies. The proposed new rules are responsive to and comply with changes made to the Plumbing License Law during the 78th Legislative Regular Session. The proposed new rules set forth procedures for the Board and its staff to follow from complaint investigations through the contested case hearings under the requirements of the Plumbing License Law and Administrative Procedure Act. The new rules are proposed in conjunction with the proposed repeal of §§361.22 - 361.24, 361.26 and 361.27. The sections proposed to be repealed set forth a portion of the same procedures in less detail as the proposed new rules.

The proposed new rule §367.8 sets forth procedures to be followed by the Board's staff for conducting complaint investigations under the requirements of the Plumbing License Law.

The proposed new rule §367.9 sets forth procedures to be followed by the Board's Enforcement Committee to resolve complaints and recommend and pursue disciplinary action for violations of the Plumbing License Law or Board Rules, including guidelines for determining when a citation should be issued.

The proposed new rule §367.10 sets forth the procedures to be followed by the Enforcement Committee when pursuing an administrative penalty according to the standardized Administrative Penalty Schedule policy adopted by the Board.

The proposed new rule §367.11 sets forth the guidelines for reprimand, probation, suspension and revocation of licenses and registrations and establishes guidelines for probation to be administered consistently.

The proposed new rule §367.12 sets forth the procedures to be followed by the Enforcement Committee when an individual fails to request a hearing after being notified of the Enforcement Committee's intent to deny the individual a license or revoke an individual's license or registration.

The proposed new rule §367.13 sets forth the procedures to be followed when the Enforcement Committee determines that an informal conference should be offered to a Respondent.

The proposed new rule §367.14 sets forth the procedures to be followed when the Enforcement Committee refers a contested case to the State Office of Administrative Hearings.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal impact on local municipal government, small businesses and persons who comply with the Plumbing License Law and Board Rules, as a result of the adoption of these new rules. Persons or entities that violate the Plumbing License Law or Board Rules could be impacted by being required to pay administrative and other penalties in



amounts from \$100.00 to \$5,000 for each violation, according to the nature and circumstances of the violation. The state government general revenue fund would be positively impacted by the amount of each administrative penalty paid by persons or entities that violate the Plumbing License Law or Board Rules.

Mr. Maxwell also has determined that each year of the first five years the rules are effect the public benefit anticipated as a result of enforcing these rules will be the protection of the public health, safety and welfare through fair and equitable enforcement of the Plumbing License Law. Additionally, the enforcement of these proposed new rules should further protect the public by discouraging violations of the Plumbing License Law and Board Rules.

Comments on the proposed new rules may be submitted within 30 days of publication of these proposed new rules in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The new rules are proposed under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law"), §§1301.251, 1301.303, 1301.451, 1301.502, 1301.504, 1301.5045, 1301.5071, Subchapter N of Chapter 1301, Occupations Code and Chapter 367 of the Board Rules. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.303 sets forth requirements for complaint investigations. Section 1301.451 sets forth the disciplinary powers of the Board. Section 1301.502 authorizes the issuance of citations according to guidelines adopted by the Board. Section 1301.504 authorizes the filing of injunctions. Section 1301.5045 authorizes the issuance of cease and desist orders. Section 1301.5071 requires the Board to adopt procedures for conducting informal conferences and authorizes the Board to order restitution. Subchapter N authorizes the Board to impose administrative penalties, sets general procedures for the imposition and collection of the administrative penalties, hearings and appeals. Board Rules Chapter 367 provides for enforcement of the Plumbing License Law, standards of conduct and requirements for licensees and registrants of the Board and persons offering to perform plumbing work and plumbing companies. These new rules are also proposed under the authority of Texas Government Code, Chapter 2001 (Administrative Procedure Act).

No other statute, article or code is affected by these proposed new rules.

§367.8. Investigation of Complaints.

(a) In accordance with the Memorandum of Understanding with the Texas Department of Licensing and Regulation, described in §1301.259 of the Plumbing License Law:

(1) the Board's Field Representatives and the Texas Department of Licensing and Regulation enforcement officers are authorized to perform on-site checks of the licenses, registrations and endorsements held by persons practicing occupations regulated by either agency and report alleged violations to the agency regulating the occupation; and

(2) the Board and the Texas Department of Licensing and Regulation shall conduct joint investigations, as circumstances require.

(b) The Board may utilize its Field Representatives, Director of Enforcement and Enforcement Committee, as appropriate, to investigate an alleged violation of the Plumbing License Law or Board Rules by a person who:

(1) is registered or licensed under the Plumbing License Law; or

(2) performs plumbing without holding a registration or license under the Plumbing License Law.

(c) The Director of Enforcement shall maintain a file and computer records on each written complaint alleging a violation of the Plumbing License Law or Board Rules filed with the board. The file and computer records are subject to the agency's record retention schedule and must include:

(1) the source of the complaint;

(2) the name of the person who filed the complaint;

(3) the date the complaint is received by the agency;

(4) the type and subject matter of the complaint;

(5) the geographic area, including the name of any municipality and the county in which the conduct that is the subject of the complaint occurred;

(6) the name of each person contacted in relation to the complaint;

(7) a summary of the results of the review or investigation of the complaint; and

(8) an explanation of the reason the file was closed, if the agency closed the file without taking action other than to investigate the complaint.

(d) The Director of Enforcement shall review the statistical information available in the complaint files and computer records, described in subsection (c) of this section, to identify geographical problem areas of the state where enforcement should be focused and make recommendations to the Enforcement Committee and the Executive Director for addressing the problems utilizing the resources available to the agency.

(e) Upon receipt of a complaint, the Director of Enforcement shall assign a priority of investigation to the complaint, with the highest priorities based on:

(1) any existing conditions that pose an immediate risk to public health, safety or property; and

(2) the possible loss of evidence that may occur if the complaint was investigated only in relation to the order that it was received; and

(3) complaints which do not contain existing conditions that pose an immediate risk or possible loss of evidence, as described in subsection (e)(1) or (e)(2) of this section, shall be investigated in relation to the order in which the complaint was received.

(f) The Director of Enforcement shall provide to the person filing the complaint and to each person who is a subject of the complaint a copy of the agency's policies and procedures relating to complaint investigation and resolution.

(g) The Director of Enforcement shall track each complaint and, at least quarterly and until final disposition of the complaint, shall notify the person filing the complaint and each person who is a subject of the complaint of the status of the investigation, unless the notice would jeopardize an undercover investigation.

(h) Following the investigation of a complaint, the Director of Enforcement shall refer the findings of the investigation with recommendations for disposition of the complaint to the Enforcement Committee.

§367.9. Enforcement Committee; Complaint Review.

(a) The Enforcement Committee shall pursue expeditious resolution of complaints by voluntary agreed settlement, whenever appropriate.

(b) The Enforcement Committee may review complaints and alleged violations referred by the Director of Enforcement and may determine to:

(1) dismiss a complaint due to:

(A) no occurrence of a violation; or

(B) the lack of sufficient evidence to prove a violation;

(2) further investigate a complaint;

(3) find that a violation may have occurred and issue a warning;

(4) find that a violation occurred and pursue an administrative penalty under the Administrative Penalty Schedule adopted by the Board;

(5) find that a violation occurred and pursue license or registration probation, suspension or revocation; or

(6) pursue any other or additional action allowed under the Plumbing License Law and Board Rules that justice may require, including:

(A) issue a Cease and Desist Order, under §1301.5045, of the Plumbing License Law;

(B) file an injunction under §1301.504, of the Plumbing License Law;

(C) issue a Class C Misdemeanor citation to repetitive offenders of the Plumbing License Law or Board Rules, only if other enforcement measures, including administrative penalties have previously been imposed; or

(7) offer an Informal Conference to a Respondent in accordance with the requirements of the Administrative Procedure Act, if the Enforcement Committee determines that such a conference is needed to assist the Enforcement Committee in determining:

(A) whether or not a violation occurred;

(B) the seriousness or the effect of a violation;

(C) the appropriate disciplinary action to be pursued, including administrative penalties, license or registration probation, suspension or revocation; or

(D) the amount of restitution to be paid by a Respondent, under §1301.5071, of the Plumbing License Law, instead of, or in addition to other disciplinary actions.

§367.10. Administrative Penalty.

(a) If the Enforcement Committee decides to pursue an administrative penalty under the Administrative Penalty Schedule adopted by the Board, the Director of Enforcement shall issue a Notice of Alleged Violation to the Respondent which must include a brief summary of the alleged violation, state the amount of the penalty pursued and inform the Respondent of the Respondent's right to a hearing before the State Office of Administrative Hearings on the occurrence of the violation or the amount of the penalty.

(b) Not later than the 20th day after the Notice of Alleged Violation is received by the Respondent, the Respondent, in writing, shall:

(1) agree to settle the matter without a formal hearing before the State Office of Administrative Hearings and accept the determination and settlement penalty recommended by the Enforcement Committee; or

(2) make a request for a formal hearing before the State Office of Administrative Hearings on the occurrence of the violation, the amount of the penalty, or both.

(c) If the Respondent agrees to settle the matter without a formal hearing and accepts the determination and amount of penalty pursued by the Enforcement Committee, the Respondent shall pay the penalty to the Board not later than 60 days following the date that the Notice of Alleged Violation was issued.

(d) The Enforcement Committee shall provide a report to the Board stating a summary of the facts or allegations against the Respondent and the amount of the recommended administrative penalty agreed to by the Enforcement Committee and the Respondent. The Board, by order, shall approve the recommended penalty.

(e) The Enforcement Committee shall set a formal hearing on the matter as a contested case at the State Office of Administrative Hearings if:

(1) the Respondent requests a formal hearing not later than the 20th day after the Notice of Alleged Violation is received by the Respondent;

(2) the Respondent fails to respond in writing to the Notice of Alleged Violation not later than the 20th day after the Notice of Alleged Violation is received by the Respondent; or

(3) the Respondent fails to pay the agreed settlement penalty to the Board not later than 60 days following the date that the Notice of Alleged Violation was issued.

(f) The Board shall not renew the license or registration of a Respondent who fails to:

(1) respond in writing to the Notice of Alleged Violation not later than the 20th day after the notice was received by the Respondent; or

(2) pay the settlement penalty to the Board not later than 60 days following the date that the Notice of Alleged Violation was issued, if the Respondent previously agreed to the penalty in written response to the Notice of Alleged Violation.

§367.11. Reprimand; Probation; Suspension; Revocation.

(a) The board shall revoke, suspend, or refuse to renew a license, endorsement, or registration or shall reprimand a holder of a license, endorsement, or registration for a violation of the Plumbing License Law or Board Rules.

(b) For the purposes of this section, a reprimand means any disciplinary action, other than the probation, suspension or revocation of a license, endorsement or registration.

(c) A person whose license, endorsement, or registration has been revoked may not apply for a new license, endorsement, or registration before one year from the date of final revocation.

(d) The board may place on probation a person whose license, endorsement, or registration is suspended. If a license, endorsement, or registration suspension is probated, the board may require the person:

(1) to report regularly to the agency on matters that are the basis of the probation;

(2) to limit practice to the areas prescribed by the board;  
or

(3) to continue or review professional education until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

(e) If the Enforcement Committee or the Board determines that probation is appropriate to deter future violations of the Plumbing License Law and Board Rules by the Respondent, probation shall be administered consistently under the following guidelines:

(1) for violations with greater potential to jeopardize public health, safety, welfare, property, or environment (as listed in the Board's Administrative Penalty Schedule for Class A violations), the term of the probation may not be less than one year or more than five years; and

(2) for violations with less potential to jeopardize public health, safety, welfare, property, or environment (as listed in the Board's Administrative Penalty Schedule for Class B violations), the term of the probation may not be less than six months or more than one year.

(f) Probation by voluntary agreed settlement between a Respondent and the Enforcement Committee may meet such terms that both parties deem fair and which in the interest of justice may require.

§367.12. Failure to Request Hearing After Notice of Intent to Deny or Revoke.

(a) If the Enforcement Committee proposes to deny an examination or registration to an applicant, or revoke a license, registration, or endorsement, the Enforcement Committee shall give timely written notice of the denial or revocation to the applicant to the last known address provided to the Board by the applicant.

(b) The language of the notice shall include:

(1) a summary of the allegations against the applicant;

(2) the applicant's right to be represented by an attorney on the matter;

(3) the applicant's right to request a hearing on the matter before the State Office of Administrative Hearings;

(4) the applicant's request for a hearing must be made no later than 20 days after the receipt of the notice; and

(5) the applicant's failure to request a hearing within 20 days after the receipt of the notice results in the Enforcement Committee's decision to deny or revoke becoming final and judicial appeal of the denial or revocation being waived by the applicant.

(c) Any individual whose application for examination, a license, registration or endorsement has been denied or revoked may re-apply to the Board after a waiting period of at least one year from the date that the denial or revocation became final. The Enforcement Committee shall be delegated the authority of making the initial review of the re-application. If the Committee decides to deny the re-application it shall proceed as defined in subsection (a) of this section.

(d) If the committee makes a decision to approve the applicant's request, it must be presented for approval before the Board members, at a regularly scheduled Board meeting to approve the applicant's request, if approved, then the applicant is to follow the same licensing or registration procedures required of a first-time licensee or registrant.

§367.13. Informal Conference.

(a) If the Enforcement Committee decides to offer an Informal Conference to a Respondent, the Director of Enforcement shall give notice of the Informal Conference, including a summary of the alleged violation and the Respondent's right to request a hearing on the allegations at the State Office of Administrative Hearings.

(b) If the Informal Conference results in the Enforcement Committee and the Respondent entering into an agreed settlement of restitution or action on the Respondents license or registration, the Director of Enforcement shall prepare an Agreed Final Order to be presented by the Enforcement Committee to the Board for adoption.

(c) If the Informal Conference fails to result in an agreed settlement, the Enforcement Committee shall set a formal hearing on the matter as a contested case at the State Office of Administrative Hearings.

§367.14. Contested Case; State Office of Administrative Hearings.

(a) A contested case shall mean any action that is referred by the Enforcement Committee or the Board to the State Office of Administrative Hearings.

(b) Respondent means:

(1) a person in a contested case charged with a violation of the Plumbing License or Board Rules; or

(2) an applicant who has been denied a license, registration or endorsement by the Enforcement Committee.

(c) The Board shall provide for a hearing at the State Office of Administrative Hearings, when requested by a Respondent, after issuing a formal complaint that:

(1) charges an individual with any violation of the Plumbing License Law or Board Rules; or

(2) would prevent an otherwise qualified individual from obtaining or renewing a license, registration, or endorsement, or taking an examination.

(d) The Board shall conduct the hearing in accordance with all applicable provisions of the Administrative Procedure Act.

(e) The Board shall give reasonable notice of the hearing to the Respondent of not less than 10 days before the hearing. In addition to any requirements of the Administrative Procedure Act, related to notice of hearing, the Board shall:

(1) mail the notice to the last known address provided to the Board by the Respondent via regular and certified mail;

(2) state in the notice that all parties will have the opportunity to respond to and present evidence and argument on all issues involved and to be represented by legal counsel; and

(3) shall include the following language in capital letters in bold face type: **FAILURE TO APPEAR AT THE HEARING WILL RESULT IN THE ALLEGATIONS AGAINST YOU SET OUT IN THE COMPLAINT BEING ADMITTED AS TRUE.**

(f) After proper notice of the hearing, if a respondent fails to appear in person or through their legal representative on the day and at the time set for hearing in a contested case, regardless of whether a written answer or other responsive pleading has been filed with the Board or the State Office of Administrative Hearings, the Administrative Law Judge, upon motion by the Board, shall enter a default judgment in the matter adverse to the Respondent who has failed to attend the hearing.

(g) For purposes of this section, default judgment shall mean the issuance of a proposal for decision against the Respondent in which the factual allegations against the Respondent contained in the Complaint shall be admitted as prima facie evidence, and deemed admitted as true, without any requirement for additional proof to be submitted by the Board.

(h) Following the hearing, the Administrative Law Judge shall make findings of fact and conclusions of law and promptly issue a Proposal for Decision on the matter to the Board, with a copy sent to the Respondent.

(i) The Administrative Law Judge shall allow no more than 15 days from the date that the Proposal for Decision is served for any party to file exceptions to the Proposal for Decision. The Proposal for Decision is considered served on the day that the Proposal for Decision is sent to all parties by the Administrative Law judge.

(j) Following the Board's consideration of the Proposal for Decision, the Board shall issue an order stating its final decision on the matter.

(k) The Enforcement Committee shall provide notice to the Respondent of the Board's order and include a statement of the Respondent's right to judicial appeal of the order. The Respondent may:

(1) pay the penalty; or

(2) file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403088

Robert L. Maxwell

Executive Director

Texas State Board of Plumbing Examiners

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 458-2145



## **TITLE 34. PUBLIC FINANCE**

### **PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM**

#### **CHAPTER 105. CREDITABLE SERVICE**

##### **34 TAC §105.5**

Texas County and District Retirement System proposes new §105.5 concerning the adjustment of a person's record because of a reporting error by a sponsoring employer. The rule implements the authority granted to the retirement system pursuant to §7 of HB 1984 as passed in the regular session of the 78th Legislature, to correct any administrative or operational error by appropriate means. Under the proposed rule, if as a result of an act or omission of an employer, a person contributes more or less than the correct amount, or receives more or less credited service, service credit or benefits than the person is rightfully entitled to receive, the employer may file an application with the retirement system for an adjustment to the person's record. Under the rule, a person seeking an adjustment to a record because of a reporting error of the employer must apply to the employer for a correction. The system will accept applications for adjustments and any related deposits only from an employer. However, under Government Code, §842.112, a person may pursue a legal remedy against the employer and submit that final judgment or settlement agreement to the system in lieu of an application. The system may adjust the

person's record in accordance with the terms set forth in the application provided: The terms of the adjustment would not grant the person a right, status or benefit not otherwise available under Government Code, Title 8, Subtitle F; the terms of the adjustment are reasonable and can be feasibly implemented and administered by the system; and the terms of the adjustment can be implemented without causing financial instability with respect to the employer's participation in the system or causing a reduction in the accrued benefit of any member or annuitant of the employer. Under the proposed rule, adjustments to credited service (vesting) may be made separately from adjustments to service credit (benefits). This allows for the recognition of all properly creditable service for retirement eligibility purposes while permitting limited or partial adjustments to benefit credits.

Tom Harrison, Director of Legal and Governmental Relations for the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government as a result of administering the rule. There will be no fiscal implications for a local government as a result of administering the rule aside from the expected costs of funding those benefits not taken into account because of a reporting error by the participating local governmental entity.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the accumulation of retirement benefits for employees of participating entities in the manner and to the extent intended by the local governmental entity. There are no anticipated economic costs to persons who are required to comply with the rule as proposed. There are no anticipated economic costs to small or large businesses which are required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted to Tom Harrison, Director of Legal and Governmental Relations, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

The Government Code, §842.112 is affected by this proposed rule.

##### §105.5. Correction of Errors by Employers: Record Adjustments.

(a) The sponsoring employer is responsible for the correction of an error arising from an act or omission of the employer that results in a person contributing more or less than the correct amount to the system or receiving more or less credited service, service credit or benefits than the person is rightfully entitled to receive under the system.

(b) The employer may initiate the correction process by filing an application with the system for an adjustment to the person's record. The application must adequately describe the error and set forth the terms of the adjustment to be made to the person's record.

(c) A person seeking an adjustment to a record based on an act or omission of the subdivision must apply to the sponsoring employer for a correction of the error. The system will not receive applications for record adjustments from any person other than an employer. If the system receives information relating to a possible error from a person other than an employer, the system shall forward the information to the appropriate employer.

(d) If the director is provided with satisfactory evidence of the error, the director may at his discretion accept the application and order an adjustment to the person's record in accordance with the terms set forth in the application provided:

(1) The terms of the adjustment on the face of the application would not grant the person a right, status or benefit not otherwise available under this subtitle;

(2) The terms of the adjustment are reasonable and can be feasibly implemented and administered by the system; and

(3) The terms of the adjustment can be implemented without causing financial instability with respect to the employer's participation in the system or causing a reduction in the accrued benefit of any other member or annuitant of the employer.

(e) In this section the term "record" means all information and amounts relating to the person and the person's beneficiary and includes information and amounts relating to the person's individual account, contributions, deposits, credited service, service credit and benefits.

(f) In this section the term "individual account" means the separate account maintained for a member consisting of the member's contributions, deposits and accumulated interest credited to the account for the benefit of the member.

(g) In this section the term "credited service" means months of service recognized for purposes of retirement eligibility.

(h) In this section the term "service credit" means the monetary credits granted to a member who performs service for a participating employer.

(i) In this section the term "filed" means received by the system.

(j) In this section the term "accepted" means approved by the system for making adjustments to a person's record in accordance with the terms of the application.

(k) The application of a sponsoring employer under this section may be filed at any time.

(l) All applications filed under this section with the system must be certified by the sponsoring employer before the application may be accepted.

(m) If an adjustment pursuant to this section relates to a period of service that is greater than 12 months or ended more than 12 months prior to the application filing date, the application must be approved by the governing board of the employer before it may be accepted by the system.

(n) If the terms of the adjustment as set forth on the application specify a change to the person's credited service, that adjustment will be made upon acceptance of the application.

(o) If the terms of the adjustment as set forth on the application specify a change to the person's individual account balance, service credit or benefit, that adjustment may not be made until the system receives any payment necessary to implement the terms of the adjustment. The system will not accept any payments due under this section from any person other than an employer.

(p) With respect to certain errors that are the subject of an adjustment under this section, the sponsoring employer may request the system to provide a description of what the person's record would show if no error had occurred. This description may include changes to amounts of employee contributions, accumulated interest, prior service credit, current service credit, multiple matching credit, retirement

benefits, or retirement eligibility dates. Evidence showing dates of service and the compensation that was paid to the member by the employer for such service should be submitted to the system in order that the system may accurately determine any changes.

(q) The application may specify adjustments in any amounts that do not exceed the changes to the person's record determined as if there had been no error.

(r) An application for an adjustment is not an application for retirement; however, a retirement application may be filed simultaneously with an application for adjustment. An adjustment to a person's prior service credit may not be made if the application is filed more than five years after the date the person became a member of the sponsoring employer.

(s) Adjustments to service credits or benefits shall be considered as part of, and funded in the same manner as, any other pension liabilities of the employer.

(t) The director may implement the terms of the proposed adjustment to the extent that the funding of the pension liabilities attributable to the adjustments proposed by the employer do not cause financial instability with respect to the employer's participation in the system or cause a reduction in accrued benefits of any other members or annuitants. This may include partial implementation or implementation of the adjustments in stages.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403160

Tom Harrison

Director, Legal and Governmental Relations

Texas County and District Retirement System

Proposed date of adoption: June 24, 2004

For further information, please call: (512) 328-8889



## CHAPTER 107. MISCELLANEOUS RULES

### 34 TAC §107.14

Texas County and District Retirement System proposes new §107.14 concerning a member's use of rollovers and transfers from other plans to restore withdrawn accounts and the related forfeited service credit. The proposed rule incorporates the changes made to the Internal Revenue Code that now allow qualified plans to accept rollovers and trustee-to-trustee transfers initiated by the plan participant for the purchase of service credit. Under the proposed rule, an eligible member may restore the withdrawn account balance and related forfeited service credit with a direct rollover or trustee-to-trustee transfer from an eligible plan provided the rollover or transfer follows the regulations of the Internal Revenue Service.

Tom Harrison, Director of Legal and Governmental Relations for the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be increased usage of the

restoration provisions because of the ability of a eligible member to access more personal resources to offset the cost. There are no anticipated economic costs to persons who are required to comply with the rule as proposed. There are no anticipated economic costs to small or large businesses which are required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted to Tom Harrison, Director of Legal and Governmental Relations, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

The Government Code, §843.003 and §843.0031 are affected by this proposed rule.

§107.14. Acceptance of Rollovers and Transfers.

(a) The system may accept the funds described in subsections (b) and (c) of this section, subject to the restrictions of this section.

(b) If permitted under and subject to the provisions of federal law, the system may accept an eligible rollover distribution from another eligible retirement plan in payment of all or a portion of any deposit a member is permitted under applicable law to make with the system for service credit.

(c) An "eligible rollover distribution" is any distribution of all or any portion of the balance to the credit of the member from an eligible retirement plan. An eligible rollover distribution does not include the following:

(1) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the member or the joint lives (or joint life expectancies) of the member and the member's designated beneficiary, or for a specified period of ten years or more;

(2) any distribution to the extent such distribution is required under Internal Revenue Code §401(a)(9);

(3) any distribution which is made upon hardship of the member; or

(4) the portion of any distribution that is not includible in gross income.

(d) An "eligible retirement plan" is any program defined in Internal Revenue Code §401(a)(31) and §402(c)(8)(B), from which the member has a right to an eligible rollover distribution, as follows:

(1) an individual retirement account under Internal Revenue Code §408(a);

(2) an individual retirement annuity under Internal Revenue Code §408(b) (other than an endowment contract);

(3) a qualified trust;

(4) an annuity plan under Internal Revenue Code §403(a);

(5) an eligible deferred compensation plan under Internal Revenue Code §457(b) which is maintained by an eligible employer under Internal Revenue Code §457(e)(1)(A); and

(6) an annuity contract under Internal Revenue Code §403(b).

(e) If permitted under and subject to the provisions of federal law, the system may accept a direct trustee-to-trustee transfer of funds

from a plan described under §403(b) or §457(b) of the Internal Revenue Code in payment of all or a portion of any deposit a member is permitted to make with the system for service credit.

(f) In order to authorize the rollover or transfer of funds described in this section, a member shall provide or cause to be provided to the system information sufficient for the system to reasonably conclude that the contribution is a valid rollover or direct trustee-to-trustee transfer as permitted under federal tax law. If the system later determines that a contribution was an invalid rollover or direct trustee-to-trustee transfer or otherwise not permitted under federal tax law, the system may take any action appropriate, permissible or required by the Internal Revenue Code or regulations issued thereunder, including recognition of an invalid rollover as an after-tax contribution by the member, or return of the invalid contribution and, if applicable, any earnings attributed thereto to the member within a reasonable time after the determination and cancellation of any credit purchased with the returned amounts.

(g) The system shall construe and administer this section in a manner such that the plan will be considered a qualified plan under §401(a) of the Internal Revenue Code of 1986, (United States Code, Title 26, §401).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403161

Tom Harrison

Director, Legal and Governmental Relations

Texas County and District Retirement System

Proposed date of adoption: June 24, 2004

For further information, please call: (512) 328-8889

◆ ◆ ◆  
**TITLE 37. PUBLIC SAFETY AND CORRECTIONS**

**PART 3. TEXAS YOUTH COMMISSION**

**CHAPTER 81. INTERACTION WITH THE PUBLIC**

**37 TAC §81.79**

*(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Youth Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Youth Commission (TYC) proposes the repeal of §81.79, concerning Historically Underutilized Business Participation. The repeal of the section will allow the agency to publish one specific chapter relating to contracts.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. McCullough also has determined that for each year of the first five years the proposed repeal is in effect the public will benefit by being able to access all agency rules relating to the purchase of goods and services in one chapter. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. No private real property rights are affected by adoption of this repeal.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to [deanna.lloyd@tyc.state.tx.us](mailto:deanna.lloyd@tyc.state.tx.us).

The repeal is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to develop rules appropriate to the proper accomplishment of its functions.

The proposed repeal implements the Human Resources Code, §61.034.

*§81.79. Historically Underutilized Business Participation.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403136

Dwight Harris

Executive Director

Texas Youth Commission

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 424-6301



## CHAPTER 83. PURCHASING YOUTH SERVICES

**37 TAC §§83.1, 83.3, 83.21, 83.23, 83.25, 83.27, 83.35, 83.37, 83.39, 83.47, 83.49**

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Youth Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Youth Commission (TYC) proposes the repeal of §§83.1, 83.3, 83.21, 83.23, 83.25, 83.27, 83.35, 83.37, 83.39, 83.47, and 83.49, regarding purchasing youth services. The repeal of the sections will allow the agency to publish one specific chapter relating to contracts.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. McCullough also has determined that for each year of the first five years the proposed repeal is in effect the public will benefit by being able to access all agency rules relating to the purchase of goods and services in one chapter. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. No private real property rights are affected by adoption of this repeal.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to [deanna.lloyd@tyc.state.tx.us](mailto:deanna.lloyd@tyc.state.tx.us).

The repeal is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to develop rules appropriate to the proper accomplishment of its functions.

The proposed repeal implements the Human Resources Code, §61.034.

§83.1. *Contracts for Parole Supervision Service.*

§83.3. *Contracts for Airport Assistance Service.*

§83.21. *Purchasing Youth Services.*

§83.23. *Rate Setting for Youth Service Contracts.*

§83.25. *Request for Proposal.*

§83.27. *Start-Up Funds.*

§83.35. *Quality Assurance of Contract Programs.*

§83.37. *Variance/Waiver Requests.*

§83.39. *Problem Solving Mechanism.*

§83.47. *Private Sector Involvement.*

§83.49. *Admission and Referral to Residential Contract Programs.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403219

Dwight Harris

Executive Director

Texas Youth Commission

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 424-6301



## CHAPTER 95. YOUTH DISCIPLINE SUBCHAPTER B. DUE PROCESS HEARINGS PROCEDURES

### 37 TAC §95.55

The Texas Youth Commission (TYC) proposes an amendment to §95.55, concerning Level II Hearing Procedure. The amendment to the section will allow the youth the opportunity to choose an advocate. The youth's choice shall be honored unless there is a showing of unavailability for any reason. If the youth makes no choice, or their first choice is unavailable for any reason, the hearing manager shall appoint the advocate. If the youth is excluded from the hearing for behavioral reasons, the advocate shall be present during the testimony and shall have the opportunity to question the witness. Witness may testify by telephone or videoconference if in-person testimony is impractical or unfeasible. If testimony is provided by phone, person required to be present at the hearing must be able to simultaneously hear the testimony. Youth will also be given the hearing packet at least 24 hours in advance of the hearing. Other amendments to this rule are clarification changes or updating policy to accurately reflect agency current practice.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the

section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will provide a youth the opportunity to request a specific person to assist them in preparing a defense due to complexity of issues and the availability of accurate, clear, and updated TYC policies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to [deanna.lloyd@tyc.state.tx.us](mailto:deanna.lloyd@tyc.state.tx.us).

The amendment is proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to best serve the youth's welfare and the protection of the public.

The proposed rule affects the Human Resources Code, §61.034.

*§95.55. Level II Hearing Procedures.*

(a) Purpose. The purpose of this rule is to establish a procedure to be followed when the second highest level of due process is afforded a youth. The level II hearing procedure is appropriate due process in the following instances:

- (1) disciplinary transfer;
- (2) disciplinary extension in length of stay;
- (3) demotion of one or more phases in the behavior area;
- (4) ~~[(3)]~~ admission to a behavior management program

(BMP);

- (5) ~~[(4)]~~ admission to the aggression management program

(AMP);

- (6) ~~[(5)]~~ with a few exceptions in procedure:

(A) admission to the Corsicana Stabilization Unit, Corsicana Residential Treatment Center; and

(B) extension of time to treat a psychiatric disorder in connection with a Corsicana Stabilization Unit placement at the Corsicana Residential Treatment Center (as appropriate).

(b)-(c) (No change.)

(d) Procedure.

(1) The designated primary service worker (PSW) or the administrative duty officer (ADO) shall request permission to schedule a hearing from the appropriate supervisor, institutional superintendent, halfway house superintendent, parole supervisor, or quality assurance administrator. The hearing must be scheduled as soon as practical but not later than seven (7) days, excluding weekends and holidays, after the alleged violation. A delay of more than seven (7) days in scheduling the hearing must be justified by documentation of circumstances[;] which made it impossible, impractical, or inappropriate to schedule the hearing.

(2) Failure to document circumstances making it impossible, impractical, or inappropriate to schedule the hearing may result in a dismissal or reversal of the decision of the hearing manager.

(3) If the youth is admitted to Institution Detention Program (IDP) pending a Level II hearing~~[level II]~~, the hearing shall be conducted within ten (10) days from date of admission to detention. A delay of more than ten (10) days in conducting the hearing must be justified by documentation of circumstances[;] which made it impossible, impractical, or inappropriate to conduct the hearing earlier.

(4) The appropriate supervisor, institutional superintendent, halfway house superintendent, parole supervisor, or quality assurance administrator will appoint an impartial staff member to act as hearing manager.

(5) The hearing manager shall be a Texas Youth Commission (TYC) staff member who is trained to function as a hearing manager.

(A) If the youth is currently assigned to an institution, the hearing manager shall be someone not directly responsible for supervising the youth

(B) If the youth is currently assigned to a halfway house, the hearing manager shall not be a member of the halfway house staff.

(C) If the youth is currently assigned to a contract program, the hearing manager shall not be the TYC quality assurance specialist assigned to that youth.

(D) If the youth is currently assigned to his/her home, the hearing manager shall not be the parole officer assigned to the youth's case or the quality assurance specialist who works directly with the youth's supervising officer.

(6)-(8) (No change.)

(9) All youth in TYC facilities and secure contract placements shall be given the hearing packet (all written materials relied upon and a list of witnesses) at least 24 hours in advance of the hearing. The paperwork may be taken away from youth in institutional detention program if the youth is misusing the papers in any way.

(10) ~~[(9)]~~ Reasonable efforts shall be made to inform the youth's parent(s) of the time and place of the hearing not less than 24 hours prior to the hearing.

(11) ~~[(10)]~~ The hearing shall consist of two parts: fact-finding and disposition, and shall be held where the youth resides unless the hearing manager determines that some other site is more appropriate. During the fact-finding portion of the hearing, only evidence concerning the alleged misconduct may be considered; the youth's prior behavior shall not be considered unless disposition is reached.

(12) ~~[(11)]~~ The youth shall be assisted by an informed and responsible advocate. The youth shall be given the opportunity to choose an advocate. The youth's choice shall be honored unless there is a showing of unavailability for any reason. If the youth makes no choice, or their first choice is unavailable for any reason, the hearing manager shall appoint the advocate ~~[appointed by the hearing manager]~~. In cases where the youth is not proficient in the English language, the appointed advocate shall be proficient in English as well as the primary language of the youth or an interpreter shall be used.

(13) ~~[(12)]~~ The hearing shall be tape-recorded and the recording shall be the official record of the hearing. The tape-recording and the hearing packet shall be preserved for six (6) months following the hearing.

(14) ~~[(13)]~~ The youth shall be present during the hearing unless he waives his presence or his behavior prevents the hearing from proceeding in an orderly and expeditious fashion.



(A) A waiver of the youth's presence shall be in writing and signed by the youth and his advocate. If the youth does not sign the waiver for any reason, his presence is not waived.

(B) If the youth waives his presence, the hearing may be conducted by teleconference.

(C) If a youth is excluded for behavioral reasons, or to secure the testimony of a witness, those reasons shall be documented in the hearing record. The advocate shall be present during the testimony and shall have the opportunity to question the witness.

(D) A true plea cannot be entered on behalf of a youth who has waived his presence at the hearing.

(15) [(14)] A victim who appears as a witness should be provided a waiting area where he is not likely to come in contact with the youth except during the hearing.

(16) [(15)] Witnesses shall take an oath prior to testifying. Witnesses may testify by telephone or videoconference if in-person testimony is impractical or unfeasible. If testimony is provided by phone, persons required to be present at the hearing must be able to simultaneously hear the testimony.

(17) [(16)] The hearing manager, PSW, and advocate may question each witness in turn. The PSW and advocate may offer summation statements.

(18) [(17)] To protect the confidential nature of the hearing, persons other than the youth, the youth's advocate, staff representative, and the youth's parent(s) may be excluded from the hearing room at the discretion of the hearings manager;[;] however, any person except the youth's advocate may be excluded from the hearing room if his/her[their] presence causes undue disruption or delay of the hearing. The reason(s) for the exclusions are stated on the record.

(19) [(18)] With the exception of the youth, any person designated as a witness may be excluded from the hearing room during the testimony of other witnesses and may be instructed to refrain from discussing his/her testimony with anyone until all the witnesses have been dismissed.

(20) [(19)] The hearings manager may permit a witness to testify outside the presence of the youth if such appears reasonable and necessary to secure the testimony of the witness. If the youth is excluded from the hearing room during testimony, the advocate for the youth shall be present during the testimony and shall have the opportunity to review the testimony with the youth before questioning the witness.

(21) [(20)] The youth shall not be called as a witness unless, after consulting with the advocate, he/she waives his right to remain silent on the record. Neither the hearing manager nor[or] the PSW may question the youth unless he/she waives the right to remain silent.

(A) The youth's failure to testify shall not create a presumption against him.

(B) A youth who waives his right to remain silent may only be questioned concerning those issues addressed by his testimony.

(22) [(21)] All credible evidence may be considered, irrespective of its form.

(23) [(22)] The standard of proof for all disputed issues is a preponderance of the evidence.

(24) [(23)] The hearings manager may[; for good cause;] recess or continue the hearing for such period(s) of time as may be necessary to insure an informed and accurate fact-finding or to secure evidence the hearing manager determines may be relevant.

(25) [(24)] The hearing manager will announce his findings of fact.

(26) [(25)] If there is a finding of true, the hearing manager shall proceed to disposition and provide the youth an opportunity to present extenuating circumstances. If no extenuation is found, the hearing manager shall order the disposition recommended by the staff representative unless the hearing manager finds extenuating circumstances.

[(A) A hearing manager's decision that a youth be transferred is final.]

(A) [(B)] A hearing manager's decision to assign a disciplinary minimum length of stay (with or without a transfer) is final subject to approval by the appropriate director of juvenile corrections or designee. [If, subsequent to the assignment of a disciplinary minimum length of stay, the appropriate director of juvenile corrections disapproves the assignment, neither the assignment nor a transfer may then occur.]

(B) [(C)] A hearing manager's decision that a youth will be transferred, demoted one or more phases, and/or admitted to [and/or an assigned a length of stay in] a disciplinary segregation program is final subject to an appeal by the youth.

(C) If extenuation circumstances are found incident to the violation(s) proved at a Level II hearing, the youth shall not be assigned a disciplinary length of stay. However, if more than one disposition option was requested (with appropriate and specific notice to the youth), such dispositions may be assessed if the hearing manager determine that such dispositions are appropriate despite the finding of extenuation.

(27) [(26)] The hearing manager shall prepare the Hearing Manager's Report of a Level II Hearing form, CCF-170, of his findings which includes grounds for the hearing, [and] evidence relied upon, and the decision.

(28) [(27)] The youth is informed of his/her right to appeal to the executive director at the close of the hearing. The pendency of an appeal shall not preclude implementation of the hearing manager's dispositional decision.

(29) [(28)] A copy of the report (CCF-170) is given to the youth immediately following the close of the hearing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403140

Dwight Harris

Executive Director

Texas Youth Commission

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 424-6301

◆ ◆ ◆  
**CHAPTER 111. CONTRACTING FOR  
SERVICES OTHER THAN YOUTH SERVICES**

**37 TAC §§111.1, 111.7, 111.9, 111.11, 111.13, 111.15,  
111.17, 111.21, 111.25, 111.35, 111.45**

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of*

*the Texas Youth Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Youth Commission (TYC) proposes the repeal of §§111.1, 111.7, 111.9, 111.11, 111.13, 111.15, 111.17, 111.21, 111.25, 111.35, and 111.45, regarding contracting for services other than youth services. The repeal of the sections will allow the agency to publish one specific chapter relating to contracts.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. McCullough also has determined that for each year of the first five years the proposed repeal is in effect the public will benefit by being able to access all agency rules relating to the purchase of goods and services in one chapter. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. No private real property rights are affected by adoption of this repeal.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

The repeal is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to develop rules appropriate to the proper accomplishment of its functions.

The proposed repeal implements the Human Resources Code, §61.034.

- §111.1. Contracting for Services.*
- §111.7. Professional and Consultant Contracts.*
- §111.9. Architect and Engineer Contracts.*
- §111.11. Construction Contracts.*
- §111.13. Construction Contract Change Order Approval.*
- §111.15. Construction Project Operation Management Process and Resolution Forum.*
- §111.17. Historically Underutilized Business (HUBs).*
- §111.21. Training and Education Contracts.*
- §111.25. Student Intern Contracts.*
- §111.35. Contract Disputes and Protests.*
- §111.45. 1st Choice--Recycled Content Products.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403218

Dwight Harris

Executive Director

Texas Youth Commission

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 424-6301



## CHAPTER 111. CONTRACTS

The Texas Youth Commission (TYC) proposes new §§111.1, 111.7, 111.9, 111.11, 111.13, 111.15, 111.17, 111.31, 111.37, 111.39, 111.45, 111.49, 111.51, 111.57, 111.61, 111.73,

111.77, 111.81, and 111.87, relating to contracts. The agency's contract rules relating to purchasing youth services are being proposed as new rules under Chapter 111. Chapter 111 rules are also proposed as new rules due to the reorganization and consolidation of these rules. The reorganization and consolidation of Chapter 83 and Chapter 111 will allow the agency to have one designated Chapter for all rules relating to contracts.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. McCullough also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the sections will allow access of all agency rules relating to the purchasing of goods and services in one Chapter. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed. No private real property rights are affected by adoption of the new sections.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

## SUBCHAPTER A. CONTRACTS FOR YOUTH SERVICES

### 37 TAC §§111.1, 111.7, 111.9, 111.11, 111.13, 111.15, 111.17

The new sections are proposed under the Human Resources Code, §61.034 and §61.037, which provides the Texas Youth Commission with the authority to develop rules appropriate to the proper accomplishment of its functions. The commission also has the authority to make reasonable efforts to ensure that the expenditure of appropriations for the purchase of contract residential care for youth be allocated to providers on a fixed monthly basis if it is cost-effective and the number, type, needs, and conditions of the youth to be served are reasonably constant.

The proposed new sections affect the Human Resources Code, §61.034.

#### §111.1. Purchasing Youth Services.

(a) Purpose. The purpose of this rule is to establish the basic requirements for purchasing youth services from residential and non-residential services providers. Texas Youth Commission (TYC) may purchase residential and non-residential care and treatment services to meet the needs of TYC youth.

(b) Applicability. This rule applies to all youth services that TYC purchases from public or private entities.

#### (c) Criteria for Purchasing Youth Services.

(1) Potential service providers will be identified through assessments or accordance to §111.9 of this title (relating to Request for Proposal). Criteria for determining the acceptability of providers include:

- (A) agency needs and budget;
- (B) service provider qualifications;
- (C) past experience (if any) with the service provider;
- (D) proposed cost;

- (E) accessibility of services to TYC youth; and
- (F) specific requirements for the desired services.

(2) The director of juvenile corrections will use the following criteria when determining which purchases of youth services require a contact:

- (A) TYC's specifications for the services;
- (B) professional qualifications;
- (C) the use of the service; and
- (D) other criteria as appropriate for the particular purchase.

(3) Each purchase of youth services must have at least the following documentation:

- (A) description of services;
- (B) payment terms and conditions;
- (C) approvals or authorizations;
- (D) invoice from service provider; and
- (E) certification that services have been received.

(d) Contracting for Residential Services.

(1) Residential service providers must be licensed or certified under:

- (A) TYC's Core Standards; or
- (B) Texas Department of Family and Protective Services (DFPS) Standards; or
- (C) Texas Department of Mental Health and Mental Retardation (MHMR) Community Standards; or
- (D) Texas Commission on Alcohol and Drug Abuse (CADA) Standards; or
- (E) Texas Department of Health (TDH) Standards; or
- (F) Texas Rehabilitation Commission (TRC) Standards; or
- (G) Texas Juvenile Probation Commission (JPC) Standards; or
- (H) other standards as determined by the appropriate juvenile corrections director.

(2) Residential service providers must agree to provide services as set forth in their response to the statement of work or accordance to §111.9 of this title.

(3) Residential service providers must agree to all terms and conditions in the contract for services.

(4) Contracts will not be automatically renewed:

(A) Recommendations for renewing contracts will be based on evaluations of performance and service delivery according to the Residential Contract Monitoring criteria.

(B) TYC will negotiate with service providers whose contracts are recommended for renewal concerning the:

- (i) types and quality of services to be provided during the renewal period;
- (ii) terms and conditions for providing these services;

(iii) rates TYC will pay for the requested service.

(C) TYC will not renew a contract if negotiations do not result in the desired types and quality of services or the rate is not agreed upon.

(e) Contracting for Non-Residential Services.

(1) The following non-residential services must have a written contract:

- (A) parole services;
- (B) chemical dependency follow-up services;
- (C) emotionally disturbed follow-up services;
- (D) sex offender follow-up services;
- (E) MHMR services;
- (F) youth advisor;
- (G) speech therapist;
- (H) diagnostician;
- (I) GED services;
- (J) youth job training or employment;
- (K) interpreter services;
- (L) psychological evaluations for youth at designated residential placements;
- (M) airport assistance services for youth in transit; or
- (N) other services as determined by the appropriate juvenile corrections director.

(2) Non-residential service providers must meet the basic qualifications for providing the requested services.

(3) Non-residential service providers must agree to all terms and conditions in the contract for services.

(4) Contracts for non-residential services will not be automatically renewed:

(A) Recommendations for renewing contracts will be based on evaluations of performance and service delivery according to contract expectations.

(B) TYC will negotiate with the service providers whose contracts are recommended for renewal concerning the:

- (i) types and quality of services to be provided during the renewal period;
- (ii) terms and conditions for providing the requested services; and
- (iii) rates TYC will pay for the requested services.

(C) TYC will not renew a contract if negotiations do not result in the desired types and quality of services or the rate is not agreed upon.

(f) Contracts may be for a term up to two (2) years unless otherwise specified in §111.9 of this title.

(g) Contracts may be amended for good cause:

- (1) TYC or the service provider may request amendments;
- (2) amendments requested by service providers will not be automatically approved. Designated TYC staff will evaluate proposed amendments and make a recommendation to the appropriate juvenile

corrections director. Criteria for evaluating proposed amendments include:

(A) agency needs and budget;  
(B) quality of current services received from service provider;

(C) significance of proposed amendment to overall level of service; and

(D) other criteria appropriate for the circumstances.

(3) TYC may negotiate with the service provider about the terms and conditions of the proposed amendment.

(h) A contract must be executed prior to the funds being obligated or services received, except in an emergency. In an emergency, the approval must be obtained from the appropriate juvenile corrections director as soon as possible.

(i) Purchasing Youth Services Not Requiring a Contract.

(1) The following purchases of youth services will not require a contract:

(A) medical services for youth in TYC's residential contract programs (e.g., physicians, hospitals, dentists, pharmacies, etc.);

(B) independent living subsidies as outlined in §87.23 of this title (relating to Subsidized Independent Living);

(C) financial assistance as outlined in §91.49 of this title (relating to College/Technical Institute Financial Assistance);

(D) transportation as outlined in the Human Resource Code §61.082 and bus tokens or passes for local transportation; and

(E) individual purchases (not define above) under \$500.00.

(2) The chief local administrator (CLA) is responsible for developing and implementing a control system for facilities and offices purchasing youth services not requiring contract. The control system must include:

(A) procedures for approval process for obligating funds or receiving services;

(B) procedures for training TYC staff and service providers;

(C) procedures for documentation process on purchases of youth services;

(D) procedures for authorizing medical services;

(E) procedures for payment of medical services; and

(F) other procedures that the CLA deems appropriate.

(3) The CLA assigns an appropriate staff responsible for authorizing purchasing youth services not requiring a contract.

#### §111.7. Rate Setting for Youth Service Contracts.

(a) Purpose. The purpose of this rule is to establish the basis on which Texas Youth Commission (TYC) will set rates of payment for contracted youth services.

(b) All rates will be established either through negotiations between TYC and the service provider; or through an appropriate competitive process; or if hourly fees, based on fair, reasonable and consistent rates which are the usual and customary fees for such services and by providers with demonstrated competence and qualifications.

(c) Except where payment is fixed, rates and payments for residential services are made on a per day per youth basis for all contract services for each contract cycle.

(d) Fixed monthly payments are not made for non-residential services.

#### §111.9. Request for Proposal.

(a) Purpose. The purpose of this rule is to establish a procurement process for residential programs, parole supervision and services, or non-residential services through the request for proposal (RFP) process.

(b) RFP Process.

(1) The appropriate juvenile corrections director or designee will be the contracting officer and will initiate the RFP process.

(2) The contracting officer:

(A) develops the RFP and criteria for screening and evaluating proposals with input from TYC staff with expertise in the components of the RFP;

(B) establishes the RFP timetable;

(C) selects a Review Committee for each RFP;

(D) ensures the Review Committee are aware of their responsibilities; and

(E) coordinates the evaluating and awarding process.

(3) The Review Committee will document their evaluations of RFPs and include explanations that are clear, concise, and pertinent.

(c) Notification of Requests for Proposal.

(1) All RFPs will be published in the *Texas Register* and will be listed in the Texas Marketplace.

(2) RFP information packets will be provided to all vendors responding to the notification.

(d) Screening and Approving Proposals.

(1) Information regarding a RFP must be submitted to TYC by the due date.

(2) Proposals are screened and evaluated according to the timetable and criteria established for each RFP.

(3) The TYC executive director shall make the final selection decision.

(e) Appeal Process. Unsuccessful applicants may appeal the award of the contract.

(1) An unsuccessful applicant has five (5) working days after being notified of the contracting decision to submit an initial appeal to TYC's contracting officer. This appeal will be in writing and include a concise statement of the facts relied upon by the unsuccessful applicant and the type of remedy sought.

(2) The contracting officer will review the initial appeal and submit a decision in writing within five (5) working days of receipt.

#### §111.11. Start-Up Funds.

(a) Purpose. The purpose of this rule is to provide an established method for the awarding of funds to private interests in order to ensure the development of additional private programs designed to meet the demand for services for youth in the Texas Youth Commission (TYC) care.

(b) Explanation of Terms Used.

(1) Start-up funds--funds which are authorized to be paid by TYC to assist in establishing programs owned and operated by private organizations which agree to provide services to delinquent youth committed to the agency.

(2) Request for Proposal (RFP)--a document and a process for requesting bids for providing specified services to TYC. It is used in a competitive procurement process for selecting a qualified and competent service provider.

(3) Funding agreement--a contractual agreement between TYC and a selected party which establishes the need for and conditions under which start-up funds will be awarded and may be expended.

(4) Advance payments--payments to service providers prior to the completion of the monthly services having been rendered.

(5) Fixed payments--fixed monthly payments to service providers based on a daily rate per bed and a predetermined number of youth, even though fewer youth may actually be in the program.

(6) Contract for services--an agreement between TYC and a service provider which provides for payment at a specified daily rate for services for TYC youth.

(7) Letter of credit--a guarantee by a service provider's bank that in the event of default on a contract for services, payment will be made when the proper documents are tendered to the service provider's bank by TYC.

(8) Default--failure to perform a legal obligation required by contract.

(c) Start-up Funds Requirements.

(1) All start-up funds paid to service providers over and above payments for services must be awarded through a RFP process.

(2) Start-up funds shall be requested through a proposed budget with narrative justifications. Requests for funds are restricted to those funds necessary to make the program operational. Unjustified amounts will not be awarded.

(3) Start-up funds will be competitively evaluated and awarded based on the total cost of services including the per diem rate, fixed number of beds and all related financial conditions and obligations.

(4) Start-up funds may not exceed a reasonable value per new bed. The start-up funds are awarded in consideration of the contract for services and the new beds made available for TYC youth.

(d) Start-up Fund Payments.

(1) All start-up funds must be expended and request for reimbursement made within the first 12 months of the contract for services.

(2) Start-up funds will be paid monthly based on the expenditures reflected in the service provider's monthly expenditure report and in accordance with the approved start-up budget.

(3) Invoices or appropriate documentation must be submitted to TYC with all requests for payment. No expenditures will be reimbursed unless within the approved budget.

(e) Allowable and Unallowable Costs. TYC has determined that certain expenses are allowable and others are not.

(1) Allowable costs.

(A) Salaries necessary to start-up of program;

(B) travel expense, not to exceed state limits;

(C) training;

(D) purchase of equipment;

(E) TYC approved renovations to program sites;

(F) rental of buildings, vehicles or equipment; and

(G) other appropriate reasonable and necessary direct costs.

(2) Unallowable costs.

(A) Entertainment expense;

(B) purchase of real property, i.e. land, buildings;

(C) any cost relating to preparation of proposal, including letter of credit;

(D) overhead or indirect costs;

(E) items not described in proposed budget and narrative; and

(F) operating capital or cash reserves.

(f) Monitoring.

(1) TYC staff shall monitor the start-up progress in accordance with the terms of the start-up funding agreement, the contract for services, and the bidder's final proposal as approved by the agency.

(2) TYC staff will begin monitoring the use of start-up funds on the date the funding agreement commences.

(3) The TYC staff responsible for start-up monitoring must approve and sign all purchase vouchers for start-up funds and ensure that appropriate goods and services have been received.

(4) TYC shall conduct a financial audit of all start-up funding contracts prior to close out and release of the letter of credit.

(g) Security.

(1) Start-up funds shall be secured through a letter of credit and a lien on property and equipment, when applicable.

(2) The letter of credit may have a decreasing monthly balance based on the contracted months of service beginning with the first operational month.

(h) Default.

(1) In the event of default, the amount of start-up funds which should be repaid will be based on the total start-up funds paid, less the amount of start-up funds earned up to the date of default.

(2) Start-up funds considered to have been earned will be based on the number of months of service for the contracted number of beds actually rendered up to the point of default.

(i) Payment for Contracted Services.

(1) Contracts for services shall not provide for advance payments. Service providers are expected to have a minimum of one month's operating capital available from other sources in order to secure the financial stability of the program. Additional funds necessary to operationalize a program should be requested in the start-up funding budget.

(2) Contracts for services shall not have fixed payments for more than ninety percent (90%) of the contracted average daily population (ADP).

(3) The start-up funding agreement shall establish a maximum time frame allowed within which a program must become operational.

(4) The start-up funding agreement and the contract for services shall establish a service period after the program becomes operational.

§111.13. Quality Assurance of Contract Programs.

(a) Purpose. The purpose of this rule is to establish a Quality Assurance Program, including sanctions, whereby the Texas Youth Commission (TYC) ensures compliance with contract and service delivery requirements by service providers.

(b) Applicability. This rule applies to all public or private entities with which TYC has a contract for youth services.

(c) Explanation of Terms Used.

(1) On-Site Visit--a visit by TYC staff to a service provider. The visit may or may not be announced.

(2) Technical Assistance--the assistance, advice or training that TYC staff offer in areas of contract implementation, performance standards, clarification, problem analysis, staff training, financial procedures, and program implementation.

(3) Monitoring--a formal review of the service provider's compliance with contract terms quality of service delivery.

(4) Sanctions--actions taken by TYC to address a service provider's non-compliance with TYC contract requirements or deficient service delivery.

(5) Corrective Action Plan--corrective action plans are used to communicate recommendations by TYC staff to remedy non-compliance with contract requirements or improve service delivery.

(6) Evaluation--a process used to measure the quality and effectiveness of service delivery.

(7) Performance Measure Rating--a residential service provider's performance on the four most recent quarterly Performance Measure Reports.

(8) Below Standards Performance Measure Rating

(A) For emergency shelters, two or more performance measures below standard on at least two of the four most recent quarterly Performance Measure Reports.

(B) For other residential service providers, three or more performance measures below standard on at least two of the four most recent quarterly Performance Measure Reports.

(9) Risk Assessment--a process by which service providers are ranked by specific factors that present the greatest risk to TYC's resources and responsibility.

(d) TYC will periodically monitor all public and private entities it has contracted with to place TYC youth by using a risk assessment methodology.

(e) TYC shall establish a monitoring schedule based on risk. Higher risk programs shall be monitored more frequently than lower risk programs. The schedule may be shared with service providers.

(f) TYC will use four response levels to address non-compliance with contract terms or deficient service delivery detected through the quality assurance program. The four response levels are:

(1) Level 1--Technical Assistance. Informal efforts to resolve issues that have not been resolved through the routine discussions between TYC staff and the service provider.

(2) Level 2--Corrective Action Plan. Corrective action plans are used to communicate recommendations by TYC staff to remedy non-compliance with contract requirements or improve service delivery.

(3) Level 3--Minor Sanctions. TYC may use the following minor sanctions:

(A) letter to the service provider's management, or other appropriate persons in the service provider's chain of command, documenting recommendations to remedy non-compliance with contract requirement or improve service delivery with due dates for implementation; or

(B) conference between TYC and the service provider's management.

(4) Level 4--Major Sanctions. TYC may use one or more of the following major sanctions:

(A) moratorium on placements;

(B) limited contract period on renewals;

(C) removal of youth;

(D) withhold payments;

(E) assess liquidated damages;

(F) draw on a performance bond;

(G) contract termination; or

(H) other sanctions as appropriate for the circumstances.

(g) Combination of Response Levels.

(1) TYC may develop the appropriate response by using components from the different response levels.

(2) The quality assurance (QA) administrator must approve any combination of components from Levels 1 - 3.

(3) The appropriate juvenile corrections director must approve any combination of levels which includes Level 4 sanctions.

(h) TYC will use one or more of the following criteria to select the appropriate response level, or combination of components from different levels, to address instances of non-compliance or deficient service delivery:

(1) extent of progress toward implementing a corrective action plan;

(2) timely implementation of recommendations in a corrective action plan;

(3) significance of non-compliance to service delivery;

(4) level of performance on one or more measures in the current quarter's Performance Measure Report;

(5) performance measure rating for the current quarter;

(6) potential impact on health, safety, or welfare of TYC youth;

(7) potential impact on the safety of the community;

(8) length of time that deficiencies have existed;

(9) potential for fraud, waste or abuse of financial resources; or

(10) other criteria appropriate for the circumstances.

§111.15. Variance/Waiver Requests.

(a) Purpose. The purpose of this rule is to allow for variances and waivers of the terms or conditions in contract agreements between the Texas Youth Commission (TYC) and a service provider when conditions warrant such changes and is in the best interest of the agency.

(b) Explanation of Terms Used.

(1) Variance--permission for the service provider to meet the intent of a standard or contractual agreement through some means other than that stated in the standard or the contract.

(2) Waiver--permission for the service provider not to comply with the stated standard.

(c) The appropriate juvenile corrections director determines whether or not to grant a variance or waiver request.

(d) TYC may permit variances and waivers at the discretion of the agency.

(e) Variance and waivers shall be time limited and may be considered for renewal through a new request.

(f) A service provider may request a variance or waiver by submission of the Service Provider Variance/Waiver Request form. TYC staff will provide the request form to the service provider. The request must include the specific standard or contract requirement, the time period, and justification for the request. The provider may be asked to provide additional information.

(g) The service provider shall receive in writing a response to the request. The service provider may be asked to agree to other stipulations as a condition of approval. Administrative appeals will not be available for disapprovals.

§111.17. Private Sector Involvement.

(a) Purpose. The purpose of this rule is to provide for private sector involvement in the development of the Texas Youth Commission (TYC) contract program administration operations by encouraging comments and opinions from interested segments of the private sector.

(b) TYC quality assurance administrators shall regularly schedule service provider meetings to:

(1) obtain input regarding implementing new operations relating to contract services;

(2) encourage the private sector to communicate suggestions for improved efficiency and effectiveness of contract operations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403213

Dwight Harris

Executive Director

Texas Youth Commission

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 424-6301

◆ ◆ ◆

## SUBCHAPTER B. CONTRACTS FOR OTHER THAN YOUTH SERVICES

**37 TAC §§111.31, 111.37, 111.39, 111.45, 111.49, 111.51, 111.57, 111.61**

The new sections are proposed under the Human Resources Code, §61.034 and §61.037, which provides the Texas Youth Commission with the authority to develop rules appropriate to the proper accomplishment of its functions. The commission also has the authority to make reasonable efforts to ensure that the expenditure of appropriations for the purchase of contract residential care for youth be allocated to providers on a fixed monthly basis if it is cost-effective and the number, type, needs, and conditions of the youth to be served are reasonably constant.

The proposed new sections affect the Human Resources Code, §61.034.

§111.31. Contracting for Services.

(a) Purpose. The purpose of this rule is to establish the authority and responsibility for utilizing and managing contracts between the private sector or other government entities and the Texas Youth Commission (TYC), an agency of the state, for the delivery of services required by TYC. Information in this rule is cumulative and should be considered in its entirety.

(b) Explanation of Terms Used.

(1) Contracts--Legal documents including Letters of Agreement, Memoranda of Understanding (MOU), Interagency/Interlocal Agreements (IAC) with other government entities, and other documents in which state funds or services are exchanged for the delivery of other goods or services. For purposes herein, contracts also includes MOUs in which an agreement is made between the Commission and another entity to share information or to jointly cooperate to obtain some common goal.

(2) Temporary worker--An individual who is employed by a private temporary placement company and assigned, usually for a specified period of time, to particular and various clients.

(3) Contract worker--independent or contract company worker--An independent contractor is an individual who directly contracts with a state agency. A contract company worker is an individual who works for a contract company and who, like a temporary worker (temp), is assigned to particular and various clients.

(4) Outsourced function(s)--The strategic use of outside resources rather than state employees to perform an entire ongoing function or set of functions for an organizational or geographical work unit. The contract is generally based on the provision of defined deliverables and not hours worked.

(5) Non-outsourced function(s)--The occasional use of outside resources to support or supplement an agency's existing workforce in special work situations, e.g. employee absences, temporary skill shortages, periods of peak workload, and services that are customarily performed by state employees.

(6) Full-Time Equivalent (FTE)--A fractional measurement of the number of employees or workers providing 2080 hours of paid work per year. Certain temporary and contract workers will count against the agency's FTE cap as established by the legislature. However, counting against the FTE cap does not imply that contractor or temporary worker is an employee of TYC.

(c) Applicability.

(1) Listed are types of contracts to which this rule applies and references to sections where specific information regarding those types of contracts may be found.

(A) Professional and Consultant Contracts, see §111.37 of this title (relating to Professional and Consultant Contracts).

(B) Architect and Engineer Contracts, see §111.39 of this title (relating to Architect and Engineer Contracts).

(C) Construction Contracts, see §111.45 of this title (relating to Construction Contracts).

(D) Training and Education Contracts, see §111.57 of this title (relating to Training and Education Contracts).

(E) Student Intern Contracts, see §111.61 of this title (relating to Student Intern Contracts).

(F) Interagency or Interlocal governmental cooperation contracts.

(G) Vending and canteen contracts.

(H) Memoranda of Understanding and Letters of Agreement.

(I) Grant, or gifts, involving the purchase of property, goods, or services.

(J) Lease (rental) of lands or facilities, either as lessee or lessor.

(K) Agreements to purchase services of temporary or contract workers even when formal contract documents are not executed.

(L) Outsourcing contracts.

(2) This rule does not apply to contracts for residential, non-residential, supplemental, parole, or mental health care for youth committed to TYC except where appropriate because certain youth services may count against the agency FTE cap and will be included in the annual Contract Workforce Report required by the legislature.

(3) This rule does not apply to contracts or purchase orders established under the authority delegated to TYC by the Texas Building and Procurement Commission (TBPC), Title 10 Government Code, §2151.001, et seq.

(4) This rule applies to the use of all agency funding sources including grant funds. Contract services that are anticipated to be purchased under a grant should be approved in accordance with this policy prior to the submission of the grant application.

(d) Utilization of Contract Services. The agency may contract for services of firms or individuals to meet particular program needs when it is in the best interest of the agency and in accordance with procedures established by statutes and TYC policy.

(1) TYC may contract to meet legitimate business needs of the agency such as:

(A) the providing of a service that can be done more economically than if provided by TYC staff personnel;

(B) the completing of a short-term project which can be more easily done through outside sources;

(C) the relieving of a temporary peak in ordinary TYC business;

(D) the undertaking of a task for which available TYC staff are not technically or professionally qualified or experienced, or for which available TYC resources are inadequate;

(E) the handling of a matter for which objectivity and/or credibility would be impaired by having agency employees perform the services.

(2) TYC makes contract workforce decisions after careful analysis and documentation of:

(A) why and how the use of contract workers fit into agency staffing strategies, including consideration of the agency mission, goals, and objectives;

(B) why the proposed services cannot be performed within current staffing levels;

(C) existing and future employee skills needed;

(D) benefits, compensation costs, productivity, nature of services to be provided, workload, efficiency, and cost effectiveness of available options; and

(E) legal and personnel issues relating to the use of a contract workforce.

(3) TYC shall evaluate the results achieved through contract services provided and shall report on the agency's use of a contract workforce to the following entities:

(A) Legislative Budget Board;

(B) State Auditor's Office;

(C) Office of the Governor; and

(D) TYC's Executive Management Team.

(4) TYC incorporates workforce strategies into the agency's human resource planning process and annual operating budget.

(5) TYC shall include in the FTE reports to the legislature and state auditor the actual hours paid for positions filled only by those temporary or contract workers who both filled specific positions customarily filled by state employees and did so for more than half of the work days in the year preceding the final day of the reporting period.

(6) TYC manages and monitors service contracts to ensure that:

(A) contractors comply with the terms and conditions of the contract;

(B) the agency receives the benefits and results intended;

(C) managerial direction and control are consistent throughout the agency; and

(D) contractor performance is evaluated and considered in future contractor selection decisions.

(e) Approval Authority. Contracts for the delivery of services to the commission, including renewals and amendments, must be approved by agency personnel consistent with total annual costs to the commission.

(1) All temporary or contract worker services and all outsourcing contracts must be approved by the assistant deputy executive director for human resources and the assistant deputy executive director for financial support.

(2) Contracts of \$5,000 or more or for longer than a 12-month duration require prior approval of the deputy executive director.



(3) All consultant contracts require approval of the deputy executive director and the executive director.

(4) Consultant contracts over \$15,000 require the approval of the executive director and the TYC Board.

(f) The executive director is responsible for executing all contracts on behalf of the TYC Board and the agency. Such authority is hereby delegated to the deputy executive director and the assistant deputy executive director for financial support.

(g) The services to be received, the responsibilities of the vendor, any deliverables (such as interim or final reports), and the method by which TYC will determine when the contract terms have been fulfilled by the contractor will be described by the agency in a statement of work.

(h) Payment shall not be made unless the TYC staff responsible for the contract certifies the receipt of services including: that the services have been delivered, are acceptable in quantity and quality, and are in compliance with all contract terms, conditions, specifications and statement of work.

§111.37. Professional and Consultant Contracts.

(a) Purpose. The purpose of this rule is to establish the authorities and responsibilities for the contracting of professional and consultant services by the Texas Youth Commission (TYC).

(b) Explanation of Terms Used.

(1) Consultant Services--those as defined in Government Code, §2254.021, and include the practice of studying and advising a state agency on agency operations in a manner not involving the traditional employer/employee relationship.

(2) Professional Services--those as defined in Government Code, §2254.002(2)(A) within the scope of the practice of accounting; architecture; land surveying; medicine; optometry; or professional engineering; or provided in connection with the professional employment or practice of a person who is licensed as a certified public accountant; an architect; a land surveyor; a physician, including a surgeon; an optometrist; or a professional engineer.

(c) Applicability. This rule applies to all contracts between TYC and non-government entities for the delivery of the types of services defined in this section.

(d) Required Approvals.

(1) Requests for professional services under \$5,000 must be approved by the facility administrator or division director and the respective assistant deputy executive director.

(2) Requests for professional services over \$5,000 require the approval of the deputy executive director in addition to those specified in paragraph (1) of this subsection.

(3) All requests for consultant services require the approval of the deputy executive director and the executive director.

(4) Requests for consultant services over \$15,000 require the approval of the executive director and the TYC Board.

(5) Consultant services must also comply with 34 TAC §5.54 Consulting Services Contracts.

(6) All contracts involving the expenditure of funds must be approved by the assistant deputy executive director for financial support.

(7) All contracts involving the expenditure of funds for outside audit services require approval of the State Auditor's Office.

(8) All contracts involving the expenditure of funds for outside legal services require approval of the Attorney General's Office.

(e) The executive director has the responsibility to execute all contracts on behalf of the TYC Board and the agency. This authority is delegated to the deputy executive director and the assistant deputy executive director for financial support.

§111.39. Architect and Engineer Contracts.

(a) Purpose. The purpose of this rule is to establish the responsibility and authority for the selection of architects, engineer, or other design professionals for construction contracts undertaken by the Texas Youth Commission (TYC).

(b) Explanation of Terms Used.

(1) Professional Services--services within the scope of the practice, as defined by state law, of accounting; architecture; land surveying; medicine; optometry; or professional engineering; or provided in connection with the professional employment or practice of a person who is licensed as a certified public accountant; an architect; a land surveyor; a physician, including a surgeon; an optometrist; or a professional engineer. This rule addresses professionals involved in the design and completion of TYC construction projects and includes architects, engineers and land surveyors.

(2) Architect--one who provides or may offer any service or creative work, either public or private, applying the art and science of developing design concepts, planning for functional relationships and intended uses, and establishing the form, appearance, aesthetics, and construction details, for any buildings, or environs, to be constructed, enlarged, or altered, the proper application of which requires architectural education, training, and experience.

(3) Engineer--a person who has been duly licensed and registered by the State Board of Registration for Professional Engineers to engage in the practice of engineering in this state. Practice of engineering shall mean any service or creative work, either public or private, the performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical, engineering sciences to such services or creative work.

(c) Applicability.

(1) This rule applies to all construction design services procured by TYC for new construction or for renovation of existing facilities for which such design capabilities are beyond the scope of the staff's ability.

(2) This rule does not apply to construction projects for which the staff has the ability to meet the legal and functional requirements for design or for those projects that do not require working plans or drawings.

(d) The TYC Board retains the authority and responsibility for the final selection of any architect or engineer contracted for the design, specifying, or oversight of construction projects undertaken by the agency.

(e) The Board may contract for construction management services of a private or government entity for the purpose of managing construction projects undertaken by the agency.

§111.45. Construction Contracts.

(a) Purpose. The purpose of this rule is to establish the responsibility and authority of the Texas Youth Commission (TYC) in the procurement of construction services for the renovation of existing facilities or for the construction of new facilities.

(b) Explanation of Terms Used.

(1) Construction Contract--the agreement between the owner and contractor to commence and complete certain public works for use and benefit of TYC as shown in the plans and described in the specifications for such public works project.

(2) General Contractor--the individual corporation, company, partnership, firm, or other organization that has contracted to perform the work, under the contract with the State of Texas acting through TYC, its agents and representatives.

(3) Working plans or drawings--one copy of all drawings, specifications, addenda, approved shop drawings and contract modifications maintained by general contractor at the site in good order and marked to record all changes made during construction.

(c) Applicability.

(1) This rule applies to all construction services procured by TYC for new construction or for renovation of existing facilities.

(2) This rule does not apply to construction projects for which the staff has the ability to meet the legal and functional requirements for design and completion of the project or for those projects that do not require working plans or drawings.

(d) TYC Board retains the authority and responsibility for the final selection of any general contractor for the construction or oversight of projects undertaken by the agency where the value of the contract exceeds \$100,000.

(e) The Board may contract for construction management services of a private or government entity for the purpose of managing construction projects undertaken by the agency.

(f) Construction projects may be undertaken by the agency without complying with this rule if the total cost of the project to the agency is less than \$100,000 and if the labor and materials are procured through competitive bidding or if the labor is done with existing staff, or if the project is of such a scope that it does not require the preparation of working plans or drawing, and the project is approved by the executive director.

§111.49. Construction Contract Change Order Approval.

All construction contract change orders shall be reviewed and approved by the central office Construction Management Committee.

§111.51. Construction Project Operation Management Process and Resolution Forum.

(a) Purpose. The purpose of this rule is to establish a process for the daily management of a construction project and provide a forum to address operational issues or problems arising from construction projects involving both the Texas Youth Commission (TYC) and the Texas Department of Criminal Justice (TDCJ).

(b) Partnering Sessions.

(1) For projects with a moderate level of complexity as defined by the project budget or the number of subcontractors who will need to coordinate, schedule, and perform work, a partnering session will be held before the project construction begins. At a minimum, sessions shall be attended by the:

- (A) TDCJ construction management;
- (B) TDCJ design group;
- (C) TDCJ quality control group;
- (D) TYC facility administrator or superintendent;
- (E) TYC business manager;

(F) TYC plant manager;

(G) architect/engineer; and

(H) contractor and subcontractors.

(2) TYC and TDCJ will hold regularly scheduled meetings as listed below. Issues or problems relating to ongoing daily construction management may be identified by contractors, architects, TDCJ project managers, or by TYC staff at construction projects including the superintendent, business manager, plant manager, or otherwise interested stakeholders. TDCJ and TYC staff will resolve issues or problems during participation in these regularly scheduled meetings.

(A) partnering sessions (required in certain cases);

(B) on-site weekly construction meetings;

(C) on-site monthly construction meetings; and

(D) weekly construction management meetings.

(c) Informal Process for Problem Resolutions.

(1) On-site weekly construction meetings shall be conducted in the spirit of mutual trust and cooperation. Routine problems or issues may be addressed at this time.

(A) The contractor, subcontractors, and TDCJ project manager must attend.

(B) Routine problems or issues are discussed and resolved on-site.

(C) Problems or issues not solved at the weekly meeting are presented at the monthly on-site meeting.

(2) On-site monthly construction meetings shall be conducted. These meetings may discuss more complex problems or issues requiring user input and problems not resolved at the weekly meetings.

(A) Attendance is required of the facility superintendent, business manager, plant manager, TDCJ project manager, TDCJ area manager, the architect/engineer, the contractor, and subcontractors.

(B) Problems or issues not resolved at the weekly meeting are discussed and resolved with input and acknowledgment of the facility management.

(C) Problems or issues not resolved at the monthly meeting are presented to the Central Office Construction Management Committee for resolution.

(D) All problems or issues shall be documented in the minutes of the meeting.

(E) Minutes of the monthly meetings shall be forwarded to the director of maintenance and operations for dissemination.

(3) A weekly construction management meeting will be conducted. Problems or issues may be discussed and resolved.

(A) Problems or issues that are unresolved at the monthly construction meeting shall be put in writing and sent to the TDCJ Construction Program Manager for TYC with a copy to the director of maintenance and operations for dissemination. A copy of the meeting minutes shall be attached for a complete record of the discussion. Refer to TYC's Institutional Operations Manual (INS) §01.51 (relating to Staff Meetings).

(B) After review, the issue shall be prepared for presentation to the Construction Management Committee. Should the resolution involve a change to the contract, the procedures outlined in

§111.49 of this title (relating to Construction Contract Change Order Approval) shall be followed.

(C) If appropriate, all formal complaints to TDCJ management shall be originated and issued by the TYC Central Office Construction Management Committee.

(d) Formal Process for Dispute Resolution. Matters to be resolved through the TYC contract dispute resolution process will comply with the procedures contained in individual construction contracts pursuant to §111.73 of this title (relating to Problem Solving Mechanism) or §111.77 of this title (relating to Negotiation and Mediation of Contract Disputes), if a written claim has been filed.

§111.57. Training and Education Contracts.

(a) Purpose. The purpose of this rule is to establish the authority and responsibilities for contracting for:

(1) training and educational assistance authorized under the Employees Training Act, Chapter 656, Government Code for the Texas Youth Commission (TYC) employees.

(2) training and education services to TYC youth authorized under §2155.143, Government Code.

(b) Explanation of Terms Used.

(1) Training--an organized, planned, and evaluated activity designed to achieve specific learning objectives.

(2) Education--instructional programs that provide Texas Education Agency (TEA) credits, or college credits, meet federal and state guidelines for special populations and result in age appropriate classes for TYC youth.

(c) Applicability.

(1) This rule applies to all staff development training which is contracted by the agency, and all contracts for the delivery of educational programs, curricula, or services to TYC youth.

(2) It does not apply to registration fees for seminars or conferences for staff development.

(d) Contracts for the training and development of TYC employees do not require competitive bidding as permitted by the Employees Training Act, if TYC has on file with the Governor's office an approved plan for training and educational assistance.

(e) Contracts for the procurement of educational services, programs or curricula for delivery to TYC youth are not required to be subjected to competitive bidding. However, TYC shall use a competitive proposal process to contract for educational programs when the services will be delivered in a residential program. These services will be acquired by the method described for the delivery of contracted youth services in Subchapter A of this chapter.

(f) All contracts for training and education services including employee training and TYC youth education services, excluding residential youth services, are to be processed in accordance with §111.31 of this title (relating to Contracting for Services), through the business services department.

§111.61. Student Intern Contracts.

(a) Purpose. The purpose of this rule is to establish a process for contracting with institutions of higher learning for the services of interns.

(b) Explanation of Terms Used. Intern--an advanced student or recent graduate who is working to gain supervised practical experience. Usually the work arrangement or agreement must meet the

requirements of an educational institution or professional association through which the intern is to receive certification.

(c) Applicability.

(1) This rule applies to agreements with individuals working to fulfill certification requirements of an educational institution or professional organization.

(2) This rule does not apply to individuals voluntarily providing a service.

(d) When in the best interest of youth programs, the services of interns may be acquired through cooperation with the Texas Statewide Corrections Internship Program or other internship programs approved by the executive director. When written agreements stipulate compensation to defray education costs, payments may be made for the services of interns. If the agreement stipulates, the intern is not charged for meals or lodging at the facility. Certain travel and other expenses may be reimbursed when stipulated in the agreement (Authority Attorney General's Opinion H1227 dated 8-10-78).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403214

Dwight Harris

Executive Director

Texas Youth Commission

Earliest possible date of adoption: June 20, 2004

For further information, please call: (512) 424-6301



## SUBCHAPTER C. MISCELLANEOUS

### 37 TAC §§111.73, 111.77, 111.81, 111.87

The new sections are proposed under the Human Resources Code, §61.034 and §61.037, which provides the Texas Youth Commission with the authority to develop rules appropriate to the proper accomplishment of its functions. The commission also has the authority to make reasonable efforts to ensure that the expenditure of appropriations for the purchase of contract residential care for youth be allocated to providers on a fixed monthly basis if it is cost-effective and the number, type, needs, and conditions of the youth to be served are reasonably constant.

The proposed new sections affect the Human Resources Code, §61.034.

§111.73. Problem Solving Mechanism.

(a) Purpose. The purpose of this rule is to establish a problem solving mechanism whereby contractors, service providers and Texas Youth Commission (TYC) staff may communicate and resolve any problems related to the provisions of a contract.

(b) Informal Resolution. Contractors, service providers and TYC staff will communicate regularly and engage in informal problem solving efforts as a routine measure, thus preventing differences from becoming major problems.

(c) Formal Resolution. When informal measures have been exhausted, contractors, service providers and TYC staff are encouraged to utilize the formal resolution mechanism.

(1) Contractors, service providers or TYC staff who wish to submit problems for resolution shall do so in writing, including relevant information and a recommended resolution.

(2) The statement of problem will be submitted to the assigned TYC staff unless the problem specifically involves the assigned TYC staff, in which case it will be submitted to the assigned TYC staff supervisor.

(3) Problems shall be resolved within ten (10) working days. Written responses will be sent to the contractor or service provider submitting the problem.

(d) Appeal.

(1) The contractor or service provider desiring to appeal the resolution may do so within ten (10) working days by submitting, in writing, information relevant to the appeal to the:

(A) chief of purchasing if the problem relates to a contract for other than youth services; or

(B) appropriate juvenile corrections director for youth service contracts.

(2) Appeals will be resolved within 14 working days. Response will be sent to the contractor or service provider submitting the appeal and the assigned TYC staff or supervisor as appropriate.

§111.77. Negotiation and Mediation of Contract Disputes.

(a) Purpose. The purpose of this rule is to establish procedures for the Texas Youth Commission (TYC) under Texas Government Code Chapter 2260 whereby the agency may conduct proceedings to resolve certain disputes involving only written contracts entered pursuant to Subchapters A and B of this chapter.

(b) Applicability.

(1) This rule does not apply to a claim for personal injury or wrongful death arising from a breach of contract.

(2) This rule does not apply to an action of TYC for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(3) This rule does not apply to a contract action proposed or taken by TYC for which a contractor receiving Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Chapter 2001 of the Texas Government Code.

(4) This rule does not apply to a contract that is solely and entirely funded by federal grant monies other than for a project defined in Texas Government Code §2166.01.

(5) This rule does not apply to a contract between TYC and the federal government or its agencies, another state, or another nation.

(6) This rule does not apply to a contract between TYC and another unit of state government.

(7) This rule does not apply to a contract between TYC and a local governmental body or a political subdivision of another state.

(8) This rule does not apply to a claim from a contractor's subcontractor, officer, employee, agent, or other persons furnishing goods or services to a contractor.

(9) This rule does not apply to a contract within the exclusive jurisdiction of state or local regulatory bodies.

(10) This rule does not apply to a contract within the exclusive jurisdiction of federal courts or regulatory bodies.

(c) Sovereign Immunity.

(1) This rule does not waive TYC's sovereign immunity to suit or liability.

(2) The procedures contained in this rule are exclusive and required prerequisites to suit under Texas Civil Practices and Remedies Code, Chapter 107, and the Texas Government Code, Chapter 2260.

(d) Contract Claims.

(1) Notice of Claim of Breach of Contract

(A) A contractor asserting a claim shall file notice of the claim as provided by this section.

(B) The notice of claim shall:

(i) no later than 180 days after the date of the event that the contractor asserts as the basis of the claim;

(ii) provide written notification to the executive director of TYC;

(iii) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the executive director of TYC. Fax or electronic transmissions shall not be used; and

(iv) state in reasonable detail:

(I) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;

(II) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

(III) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed.

(v) provide supporting documentation or other tangible evidence to facilitate TYC's evaluation of the claim; and

(vi) be signed by the contractor or the contractor's authorized representative.

(2) Counterclaim by the Commission.

(A) In order to assert a counterclaim TYC shall file notice of the counterclaim not later than 90 days after the date of the contractor's notice of claim.

(B) Nothing herein precludes TYC from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

(e) Negotiation.

(1) The parties may conduct negotiations of claims and counterclaims within a reasonable period of time as long as the negotiations start prior to the 60th day following the later of:

(A) the date of termination of the contract;

(B) the completion date, or substantial completion date in the case of construction projects, in the original contract; or

(C) the date TYC receives the contractor's notice of claim.

(2) TYC may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by giving written notice to the contractor:

(3) The parties shall complete the negotiations as provided by this rule as a prerequisite to a contractor's request for contested case hearing no later than 270 days after TYC receives the contractor's notice of claim unless the parties agree in writing to extend the time for negotiations.

(4) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the parties shall select representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

(5) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support their respective claims, defenses, counterclaims, or positions.

(6) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

(7) The agreement may resolve an entire claim or counterclaim or any designated and severable portion of a claim.

(8) The agreement must be in writing and signed by representatives of the contractor and TYC who have authority to bind each respective party.

(9) A partial settlement does not waive a party's rights to proceed on the parts of the claims or counterclaims that are not resolved.

(10) Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees, and expert's fees.

(f) Mediation

(1) The parties may agree to mediate the dispute at any time before the 270th day after TYC receives the contractor's notice of claim or before the expiration of any written extension agreed to by the parties.

(2) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009. For purposes of this subrule, "mediation" is assigned the meaning set forth in the Texas Civil Practice and Remedies Code §154.023.

(3) Sources of mediators shall include governmental officers or employees who are qualified as mediators under §154.052, Texas Civil Practice and Remedies Code, private mediators, State Office of Administrative Hearings (SOAH), the Center for Public Policy Dispute Resolution at the University of Texas School of Law, an alternative dispute resolution system created under Chapter 152, Texas Civil Practice and Remedies Code, or another state or federal agency or through a pooling agreement with several state agencies.

(4) The confidentiality of a final settlement agreement to which TYC is a signatory that is reached as a result of the mediation is governed by Texas Government Code, Chapter 552.

(5) Each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, attorney's fees,

and consultant or expert fees. The costs of the mediation process itself shall be divided equally between the parties.

(g) Settlement Agreement.

(1) A settlement agreement reached as a result of negotiation or mediation that resolves an entire claim or counterclaim or any designated and severable portion of a claim or counterclaim shall be in writing and signed by the representatives of the contractor and TYC who have authority to bind each respective party.

(2) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

(3) A partial settlement does not waive a contractor's rights under the Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

(h) Referral to the State Office of Administrative Hearings.

(1) The contractor may request a contested case hearing before the SOAH after the 270th day after TYC receives the contractor's notice of claim, or the expiration of any written extension.

(2) If a claim for breach of contract is not resolved in its entirety through negotiation or mediation in accordance with this rule on or before the 270th day after TYC receives notice of claim, or after the expiration of any written extension agreed to by the parties, the contractor may file a request with TYC for a contested case hearing before SOAH.

(3) A request for a contested case hearing shall state the legal and factual basis for the claim, and shall be delivered to the executive director of TYC or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to by the parties.

(4) TYC shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed thirty days after receipt of the request.

(5) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by TYC if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

§111.81. Historically Underutilized Businesses (HUBs).

(a) Purpose. The purpose of this rule is to establish the procedures used by the Texas Youth Commission (TYC) to comply with the Historically Underutilized Business (HUB) Program. TYC's goal is a good faith effort to promote through race, ethnic, and gender-neutral means full and equal business opportunities for all businesses that are qualified to participate in the HUB program.

(b) Applicability.

(1) This rule applies to construction projects and purchases of goods and services that are paid for with appropriated money and authorize by law including all contracts and purchase orders delegated to it by the Texas Building and Procurement Commission (TBPC) and under this chapter.

(2) This policy does not apply to contracts for purchases of youth services with a political subdivision or a non-profit organization. Refer to §111.1 of this title (relating to Purchasing Youth Services).

(c) Pursuant to §2161.003, TYC adopts the Texas Building and Procurement Commission's published rules dealing with HUB programs. Refer to the Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter B.

(d) Good Faith Effort.

(1) TYC makes a good faith effort to meet and increase the utilization goals established by TBPC to assist certified HUBs in receiving a portion of the total contract value of all contracts that TYC expects to award each fiscal year.

(2) TYC shall provide the HUB coordinator with necessary and sufficient resources from its current operations and budget to effectively promote the achievement of all the responsibilities of the HUB coordinator.

(e) HUB Credit.

(1) TYC receives HUB credit for the total value of contracts awarded directly to certified HUBs. When the prime contractor or vendor is a certified HUB, it must perform at least 25% of the total value of the contract with its own or leased employees, as defined by the Internal Revenue Service (IRS), in order for the agency to receive HUB credit for the entire contract amount.

(2) If a prime HUB contractor's or vendor's HUB subcontracting plan identifies that it is planning to perform less than 25% of the total value of contract with its employees, the agency receives HUB credit for the value of the contract that was actually performed by the prime HUB contractor or vendor and its HUB subcontractors.

(3) To obtain HUB credit, the agency must report its HUB subcontracting expenditures to the TBPC as set out in subsection (f)(7) of this section.

(f) HUB Coordinator's Responsibilities.

(1) TYC shall designate a staff member to serve as the HUB coordinator for the agency. The HUB coordinator applies the policies adopted by the TBPC with regard to the state's HUB program.

(2) The HUB coordinator advises and assists the agency's executive director and procurement personnel in complying with the statutory requirements relating to HUB programs and annual procurement utilization goals.

(3) The HUB coordinator assists in the development of the agency's procurement specifications and the evaluation of agency contracts for compliance. The HUB coordinator facilitates compliance with the agency's good faith effort criteria and HUB reporting and assists contract administration with HUB related information and criteria. The HUB coordinator provides marketing and outreach efforts for HUB participation and assists prime contractors and vendors with the implementation and refinement of HUB subcontracting plans.

(4) Mentor-Protégé Program. Based upon the agency's unique mission and available resources and compliance with the TBPC regulations, the HUB coordinator is responsible for establishing, implementing, monitoring and reporting the agency's Mentor-Protégé Program. Participation by the prime or subcontractor must be voluntary.

(5) HUB Forums. Using TBPC's model, the HUB coordinator will design the agency's HUB forum program to include presentations of relevant anticipated contracting and subcontracting opportunities, notifications for required attendance at the HUB forums to appropriate senior managers and procurement personnel, and notification to contractors who may be subcontracting for goods and service of a type supplied by HUBs of said forums.

(6) Texas HUB Certification Directory. The HUB coordinator accesses the HUB Certification Directory electronically to determine if a bidder is a certified HUB and uses the Directory in conjunction with the TBPC's bidder list to solicit bids from certified HUBs for agency contracts.

(7) Information Required for Reporting

(A) The HUB coordinator reports to TBPC, no later than March 15 of each year regarding the previous six (6) month period and on September 15 of each year regarding the preceding fiscal year the following information:

(i) the total dollar amount of HUB subcontracting participation in all of TYC's contracts for the purchase of goods, services and public works payments paid from Treasury and Non-Treasury funds;

(ii) such information as requested by TBPC in a form prescribed by the TBPC with purchases from state term contracts paid from non-treasury funds identified in the report as such;

(iii) with cooperation from the state comptroller's office categorization of each HUB included in the report by sex, race, and ethnicity; and

(iv) if TYC participates in a group purchasing program, the HUB coordinator shall include a separate report to TBPC of purchases that are made through the group purchasing program and shall report the dollar amount of each purchase that is allocated to TYC.

(B) In order to provide the required information for reports to TBPC, the HUB coordinator shall maintain and compile monthly the following information including information regarding subcontractors and suppliers relating to each of TYC's operating division's use of HUBs:

(i) the volume of work performed under the contract;

(ii) the portion of the work that was performed with contractors/vendors' employees, non-HUB contractors/vendors and other HUB contractors/vendors; and

(iii) the identity of each HUB and amount paid by any prime contractor or vendor to each certified HUB each month in which such payment is made.

(C) TYC may request payment documentation and the HUB subcontracting plan that confirms the performance of the HUB contractor or vendor.

(D) The HUB coordinator shall discuss the performance of the contractor or vendor and document the contractor or vendor's HUB performance in the contract file. Any deficiencies will be identified by the HUB coordinator and must be rectified prior to the next reporting period by the contractor/vendor.

(8) Contracts of \$100,000 or More

(A) When TYC enters into a contract with an expected value of \$100,000 or more and before the agency solicits bids, proposals, offers, or other applicable expressions of interest for the contract, the HUB coordinator will determine whether there will be subcontracting opportunities under the contract. If the HUB coordinator determines that there is a probability of subcontracting opportunities, the HUB coordinator shall require that each bid, proposal, offer, or other applicable expression of interest for the contract to include a HUB subcontracting plan.

(B) When a HUB subcontracting plan is required:

(i) a bid, proposal, offer, or other applicable expression of interest for the contract must contain an HUB subcontracting plan to be considered responsive;

(ii) the awarded contract shall contain the plan that the contractor submitted in their bid, proposal, offer, or other applicable expression of interest that must be fulfilled by the contractor or vendor;

(iii) the contractor or vendor shall make good faith efforts to implement the plan; and

(iv) a contractor's or vendor's participation in a mentor-protégé program and submission of a protégé as a subcontractor in the contractor's historically underutilized business subcontracting plan constitutes a good faith effort under this section for the particular area of the subcontracting plan involving the protégé.

(C) To the extent that subcontracts are not contracted for as originally submitted in the HUB subcontracting plan, the prime contractor or vendor shall report to HUB coordinator all the circumstances that explain that fact and describe the good faith efforts made to find and subcontract with another HUB.

(D) The HUB coordinator shall audit the prime contractor or vendor's compliance with the HUBs' subcontracting plan. In determining whether the contractor or vendor made the required good faith effort, the HUB coordinator may not consider the success or failure of the contractor or vendor to subcontract with HUBS in any specific quantity. The HUB coordinator's determination is restricted to considering factors indicating good faith.

(E) If the HUB coordinator determines that the prime contractor or vendor failed to implement the plan in good faith, the HUB coordinator, in addition to any other remedies, may recommend that the executive director bar the contractor or vendor from further contracting opportunities with TYC.

(g) TYC Strategic Planning--HUB. TYC shall include in its strategic plan a written plan for increasing the agency's use of HUBs in purchasing and public works contracting. The plan must include:

(1) a policy or mission statement relating to increasing the use of HUBs by the state agency;

(2) goals to be met by the agency in carrying out the policy or mission; and

(3) specific programs to be conducted by the agency to meet the goals stated in the plan, including a specific program to encourage contractors to use HUBs as partners and subcontractors.

(h) Legislative Appropriations Requests--HUB.

(1) As part of TYC's legislative appropriations requests, a detailed report shall be submitted that shows the extent to which TYC complies with the state's HUB program as a performance measure.

(2) The detailed report will show the extent to which TYC complied with the HUB program during the two (2) calendar years preceding the calendar year in which the request is submitted and to the extent that TYC did not comply the reasons for that fact.

#### §111.87. 1st Choice-Recycled Content Product.

(a) Purpose. The purpose of this rule is to establish the authority and responsibility to target designated recycled-content products defined as "1st Choice" as the default purchase commodities for the Texas Youth Commission (TYC) per Texas Government Code §2155.448 and Texas Administrative Code, Title 1, §113.156 and §113.137.

(b) Explanation of Terms Used.

(1) Recycling Market Development Board (RMDB)--the RMDB is charged with pursuing an economic development strategy

that focuses on the state's waste management priorities including development of recycling industries and markets. The RMDB consists of the agency heads of the Texas Building and Procurement Commission (TBPC), the Texas Commission on Environmental Quality (TCEQ), the Texas Department of Transportation (TDOT), the Texas General Land Office (TGLO), and the Texas Department of Economic Development (TDED).

(2) 1st Choice Recycled-Content Products--designated by the RMDB as the default and preferred recycled purchase items for state agencies. The RMDB will add to the list of 1st Choice recycled-content products on an annual basis.

(3) Virgin Counterpart--products defined in 1st Choice recycled-content products which are not recycled, remanufactured, or environmentally sensitive commodities or services.

(4) Justification Letter--deviations from 1st Choice products require a letter to TBPC justifying the purchase of the virgin equivalent product(s) prior to acquiring the item(s). Factors for deviations are cost, quality, not available, and other reasons. A 1st Choice justification letter is not required when the combined total purchase on a single purchase order is equal to or less than \$150.00.

(c) Applicability. This rule applies to all contracts and purchases orders established under the authority delegated to TYC by the TBPC, Government Code, Chapter 2155; TYC General Administrative Policy Manual §10.17 (relating to Purchase of Goods and Services); and §111.31 of this title (relating to Contracting for Services).

(d) Acquisition. In accordance with Texas Government Code, §2155.448 and Title 1, TAC, §113.136 and §113.137, TYC shall procure 1st Choice recycled-content products and services versus virgin counterparts. The TYC recycling coordinator will advise and assist the agency executive director and staff in complying with requirements of the recycled content products program. It is the policy of the State of Texas and TYC to identify and procure recycled, remanufactured, or environmentally sensitive commodities or services where required under the 1st Choice program.

(e) Exemptions.

(1) Current contracts are exempted from this requirement until expiration. Upon contract renewal, the new contract will contain provisions for 1st Choice recycled-content products or services.

(2) Oil changes and vehicle lubrication services acquired through vehicle service cards are exempted.

(f) New Contracts. New contracts will contain the 1st Choice recycle-content products or services requirement as a term and condition of the contract.

(g) Deviations. Deviations require a justification letter signed by the agency's executive director or designee prior to execution of the contract.

(h) Printing Services. Printing services will require specifying 1st Choice recycled-content paper and a breakdown of the cost of the paper and the printing service. The cost of the paper will be captured and reported on the monthly report.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403217

Dwight Harris  
Executive Director  
Texas Youth Commission  
Earliest possible date of adoption: June 20, 2004  
For further information, please call: (512) 424-6301





# WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

## **TITLE 22. EXAMINING BOARDS**

### **PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING**

#### **CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES**

##### **SUBCHAPTER E. CONTESTED CASES**

###### **22 TAC §661.62**

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section, submitted by the Texas Board of Professional Land Surveying has been automatically withdrawn. The amended section as proposed appeared in the November 7, 2003 issue of the *Texas Register* (28 TexReg 9695).

Filed with the Office of the Secretary of State on May 10, 2004.  
TRD-200403181



## **TITLE 34. PUBLIC FINANCE**

### **PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS**

#### **CHAPTER 87. DEFERRED COMPENSATION**

##### **34 TAC §§87.1, 87.3, 87.5, 87.7, 87.9, 87.11, 87.13, 87.15, 87.17, 87.19, 87.21, 87.25, 87.31, 87.33, 87.34**

The Employees Retirement System of Texas has withdrawn from consideration the proposed amendments to §§87.1, 87.3, 87.5, 87.7, 87.9, 87.11, 87.13, 87.15, 87.17, 87.19, 87.21,

87.25, 87.31, 87.33, 87.34 which appeared in the April 2, 2004, issue of the *Texas Register* (29 TexReg 3416).

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200403001

Paula A. Jones

General Counsel

Employees Retirement System of Texas

Effective date: May 3, 2004

For further information, please call: (512) 867-7125



## **TITLE 37. PUBLIC SAFETY AND CORRECTIONS**

### **PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION**

#### **CHAPTER 217. LICENSING REQUIREMENTS**

##### **37 TAC §217.11**

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section's, submitted by the Texas Commission on Law Enforcement Officer Standards and Education has been automatically withdrawn. The amended section as proposed appeared in the October 31, 2003 issue of the *Texas Register* (28 TexReg 9451).

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403180



# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 1. ADMINISTRATION

### PART 4. OFFICE OF THE SECRETARY OF STATE

#### CHAPTER 95. UNIFORM COMMERCIAL CODE

##### SUBCHAPTER B. ACCEPTANCE AND REFUSAL OF DOCUMENTS

###### 1 TAC §95.205

The Office of the Secretary of State adopts the repeal of Chapter 95, Subchapter B, §95.205, concerning Acknowledgment, without changes to the proposal as published in the April 2, 2004, issue of the *Texas Register* (29 TexReg 3321) and will not be republished.

The purpose of the repeal is to conform to national model administrative rules promulgated by the International Association of Commercial Administrators and to more accurately reflect current filing policies and procedures due to legislative changes.

No comments were received regarding the repeal.

The repeal is adopted under §§9.501 - 9.527, Texas Business and Commerce Code, §§35.01 - 35.09, Texas Business and Commerce Code, §§14.001 - 14.007, Texas Property Code, §§70.401 - 70.410, Texas Property Code, Chapter 128, Texas Agriculture Code, Chapter 188, Texas Agriculture Code, §42.22, Texas Code of Criminal Procedure, and §§51.901 - 51.905, Texas Government Code which provides the Secretary of State with the authority to adopt rules necessary to administer Subchapter D of Chapter 9, Texas Business and Commerce Code, Subchapter A of Chapter 35, Miscellaneous, Chapter 14, Uniform Federal Lien Registration Act, Subchapter E of Chapter 70, Texas Property Code, Subtitle H of Title 5, Texas Agriculture Code, Subtitle E of Title 6, Texas Agriculture Code, and Subchapter J of Chapter 51, Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403091

Lorna Wassdorf

Director, Statutory Filings Division

Office of the Secretary of State

Effective date: May 27, 2004

Proposal publication date: April 2, 2004

For further information, please call: (512) 463-5701

###### 1 TAC §95.205

The Office of the Secretary of State adopts new Chapter 95, Subchapter B, §95.205, concerning Acknowledgment, without changes to the proposed text as published in the April 2, 2004, issue of the *Texas Register* (29 TexReg 3321).

The purpose of the adoption of new §95.205 is to conform to national model administrative rules promulgated by the International Association of Commercial Administrators and to more accurately reflect current filing policies and procedures due to legislative changes.

The new section provides current filing policies and procedures for the Uniform Commercial Code Section.

No comments were received regarding adoption of the new rule.

The new section is proposed under §§9.501 - 9.527, Texas Business and Commerce Code (effective July 1, 2001), §§35.01 - 35.09, Texas Business and Commerce Code, §§14.001 - 14.007, Texas Property Code, Chapter 128, Texas Agriculture Code, Chapter 188, Texas Agriculture Code, §42.22, Texas Code of Criminal Procedure, and §§51.901 - 51.905, Texas Government Code which provides the Secretary of State with the authority to adopt rules necessary to administer Subchapter D of Chapter 9, Texas Business and Commerce Code, Subchapter A of Chapter 35, Miscellaneous, Chapter 14, Uniform Federal Lien Registration Act, Subtitle H of Title 5, Texas Agriculture Code, Subtitle E of Title 6, Texas Agriculture Code, and Subchapter J of Chapter 51, Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 7, 2004.

TRD-200403092

Lorna Wassdorf

Director, Statutory Filings Division

Office of the Secretary of State

Effective date: May 27, 2004

Proposal publication date: April 2, 2004

For further information, please call: (512) 463-5701

### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 355. MEDICAID REIMBURSEMENT RATES

## SUBCHAPTER G. TELEMEDICINE SERVICES AND OTHER COMMUNITY-BASED SERVICES

### 1 TAC §355.5902

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.5902, without changes to the proposed text published in the February 6, 2004, issue of the *Texas Register* (29 TexReg 1118).

The amendment was undertaken to change the term for clients who receive a priority service break designation from "Priority 1" to "priority," replace the term "provider agency" with "contract," and replace the terms "contracted provider" and "provider" with "provider agency," as appropriate. These changes ensure that the rule reflects the name change made by the Texas Department of Human Services for clients with a priority service designation and more accurately describes the use of contracts in reimbursement determination.

HHSC received no comments regarding adoption of the amendment.

The amendment is adopted under the Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Human Resources Code, Chapter 32.

The amendment affects the Government Code, §§531.033 and 531.021(b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403155

Steve Aragón

General Counsel

Texas Health and Human Services Commission

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## TITLE 19. EDUCATION

### PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

#### CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

#### SUBCHAPTER B. TRANSFER OF CREDIT, CORE CURRICULUM AND FIELD OF STUDY CURRICULA

### 19 TAC §4.22, §4.23

The Texas Higher Education Coordinating Board adopts amendments to §§4.22 and 4.23, concerning the Texas Common Course Numbering System (TCCNS) without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1501). Specifically, the amendments implement a change mandated by Texas Education Code, §61.832. The amendments provide the statutory citation for the Board's authority to approve the TCCNS, and add a formal definition of the TCCNS. Existing rules are expanded to include new §4.35 that approves the use of the TCCNS by institutions of higher education. A uniform manner of use is prescribed in this section for all institutions of public higher education.

The following comments were received regarding the amendments):

Comment: Comment from Angelo State University (ASU): (summarized) Publication schedules for printed catalogs are far in advance. ASU is preparing its 2005-2007 catalog now. Will the rule apply to catalogs or publications produced after 9/1/05 or publications with information for the semester encompassing 9/1/05? Although this is noted as having no fiscal impact, these changes will require significant staff time, at least initially, to connect the proper equivalencies to the courses listed in the bulletin and the schedule.

Response: The rules will apply to catalogs or publications produced after 9/1/05. Institutions will need to have reviewed and identified all lower-division courses they offer that have equivalents through the TCCNS before that deadline. The impact statement considers fiscal implications to state or local government, not to individual colleges and universities. We agree that universities especially will incur some staff cost in reviewing and identifying their institution's lower-division courses that have TCCNS equivalents and modifying their informational resources. No changes were made as a result of this comment.

Comment: Comment from University of North Texas (UNT): At the present time, UNT meets all of the mandates set forth by the proposal.

Response: That comment contained no objections to the amendments and did not require any changes to the proposed amendments.

The amendments are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with general rule-making authority; §61.002, which establishes the Coordinating Board as an agency charged to provide leadership and coordination for the Texas higher education system; §61.051, which provides the Coordinating Board with authority to coordinate institutions of public higher education in promoting quality education; and §61.832, which instructs the Board to cooperate with institutions of higher education in the development of rules for the administration and applicability of the TCCNS.

The Coordinating Board hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402993

Jan Greenberg  
General Counsel  
Texas Higher Education Coordinating Board  
Effective date: May 23, 2004  
Proposal publication date: February 20, 2004  
For further information, please call: (512) 427-6114



## 19 TAC §4.35

The Texas Higher Education Coordinating Board adopts new §4.35 concerning the Texas Common Course Numbering System (TCCNS) with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1501). Specifically, the new section implements a change mandated by Texas Education Code, §61.832. Existing rules are expanded to include new §4.35 that approves the use of the TCCNS by institutions of higher education. A uniform manner of use is prescribed in this section for all institutions of public higher education.

The following comments were received regarding the new section:

Comment: Comment from Texas A&M University-Kingsville (TAMUK): (1) Will the common course number have to be displayed next to the TAMUK course number when listed in the degree plan requirements in our catalogue? Since the numbers will be indicated beside the TAMUK number in the course descriptions portion of the catalog, we think this will be duplicative and could possibly lead to confusion. (2) Does the common course number need to be displayed by each course in the Class Schedule that is published each semester? Our schedule is computer-generated in a prescribed format. To include the TCCNS in the schedule will involve manual manipulation and will considerably slow down the process of creating the course schedule.

Response: The purpose of the rules is to provide clear, consistent communication to students about TCCNS and its use in institutional catalogs and other appropriate informational resources. Display of the TCCNS number next to the institution's own course number at the beginning of the course description will be sufficient. As long as the catalog and other informational resources include the TCCNS number next to the institution's own course number at the beginning of the course description, and the other provisions of the relevant rules are observed, it is not necessary to include the TCCNS number at each instance a course is cited in a degree plan/course outline, or in course schedule listing publications that change from term to term. Changes were made to §4.35(a)(1) to clarify.

The new section is adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with general rule-making authority; §61.002, which establishes the Coordinating Board as an agency charged to provide leadership and coordination for the Texas higher education system; §61.051, which provides the Coordinating Board with authority to coordinate institutions of public higher education in promoting quality education; and §61.832, which instructs the Board to cooperate with institutions of higher education in the development of rules for the administration and applicability of the TCCNS.

§4.35. *Texas Common Course Numbering System.*

(a) Each institution shall include the applicable course numbers from the TCCNS in its printed and electronic catalogs, course listings, and any other appropriate informational resources, and in the application of the provisions of this subchapter. Institutions that do not use the TCCNS taxonomy as their sole means of course numbering shall publish the following information in their printed and electronic catalogs, course listings, and any other appropriate informational resources:

(1) The TCCNS prefix and number must be displayed immediately adjacent to the institutional course prefix and number (e.g. ENG 101 (ENGL 1301) at the beginning of each course description; and

(2) The printed and electronic catalogs shall include a chart, table, or matrix, alphabetized by common course prefix, listing all common courses taught at the institution by both the common and local course number. For printed catalogs, the chart, table, or matrix should be referenced in a table of contents and/or a subject index.

(b) Each institutional catalog shall include an explanation of the TCCNS and the significance of TCCNS courses for transfer purposes.

(c) Each institution shall comply with the requirements of sections (a) and (b) no later than September 1, 2005.

(d) For good cause, the Commissioner may approve an exemption from the requirements of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402994  
Jan Greenberg  
General Counsel  
Texas Higher Education Coordinating Board  
Effective date: May 23, 2004  
Proposal publication date: February 20, 2004  
For further information, please call: (512) 427-6114



## SUBCHAPTER D. DUAL CREDIT PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND TEXAS PUBLIC COLLEGES

### 19 TAC §4.83

The Texas Higher Education Coordinating Board adopts amendments to §4.83, concerning student eligibility requirements for dual credit courses, without changes to the proposed text as published in the February 27, 2004, issue of the *Texas Register* (29 TexReg 1797). Specifically, the adopted amendments would add a definition of the Texas Assessment of Knowledge and Skills (TAKS).

There were no comments received concerning the amendments.

The amendments are adopted under Texas Education Code, §§29.182, 29.184, 61.027, 61.076(J), 130.001(b)(3) - (4), 130.008, 130.090, and 135.06(d) which provides the Coordinating Board with the authority to regulate dual credit partnerships between secondary schools and public colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403035

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 27, 2004

For further information, please call: (512) 427-6114



## 19 TAC §4.85

The Texas Higher Education Coordinating Board adopts amendments to §4.85(b), concerning student eligibility requirements for dual credit courses, with changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2518). Specifically, the adopted amendments would prescribe college readiness requirements for dual credit students under TAKS and the Texas Success Initiative.

No comments were received. However, Board staff recommends a non-substantive change that would provide clarification about dual credit eligibility for students qualifying under the standards for the tenth grade TAKS. Students demonstrating eligibility based on the tenth grade TAKS must do so for those sections relevant to corresponding academic/general education courses. For instance, if a student achieves the college readiness standard for mathematics and not for English Language Arts, s/he is eligible to enroll in academic/general education courses relevant to mathematics only.

The amendments are adopted under Texas Education Code, §§29.182, 29.184, 61.027, 61.076(J), 130.001(b)(3) - (4), 130.008, 130.090, and 135.06(d) which provides the Coordinating Board with the authority to regulate dual credit partnerships between secondary schools and public colleges.

### §4.85. Dual Credit Requirements.

#### (a) Eligible Courses.

(1) Courses offered for dual credit by public two-year associate degree-granting institutions must be identified as college-level academic courses in the current edition of the Lower-Division Academic Course Guide Manual adopted by the Board or as college-level workforce education courses in the current edition of the Workforce Education Course Manual adopted by the Board.

(2) Courses offered for dual credit by public universities must be in the approved undergraduate course inventory of the university.

(3) Public colleges may not offer remedial and developmental courses for dual credit.

#### (b) Student Eligibility.

(1) A high school student is eligible to enroll in dual credit courses in the eleventh and/or twelfth grade if the student:

(A) demonstrates college readiness by achieving the minimum passing standards under the provisions of the Texas Success Initiative as set forth in §4.57 of this title (relating to Minimum Passing Standards) on relevant section(s) of an assessment instrument

approved by the Board as set forth in §4.56 of this title (relating to Assessment Instruments); or

(B) demonstrates that he or she is exempt under the provisions of the Texas Success Initiative as set forth §4.54 of this title (relating to Exemptions/Exceptions).

(2) An eleventh grade high school student is also eligible to enroll in dual credit courses if the student achieves a score of 2200 on Mathematics and/or a score of 2200 on English Language Arts with a writing subsection score of at least 3 on the tenth grade TAKS relevant to the courses to be attempted. An eligible high school student who has enrolled in dual credit courses in the eleventh grade shall not be required to demonstrate further evidence of eligibility to enroll in dual credit courses in the twelfth grade.

(3) A high school student is eligible to enroll in workforce education dual credit courses in the eleventh and/or twelfth grade if the student demonstrates that he or she has achieved the minimum high school passing standard on the Mathematics section and/or the English/Language Arts section on the tenth or eleventh grade TAKS.

(A) A student may enroll only in those workforce education dual credit courses for which the student has demonstrated eligibility.

(B) A student who is exempt from taking TAKS may be otherwise evaluated by an institution to determine eligibility for enrolling in workforce education dual credit courses.

(4) Students who are enrolled in private or non-accredited secondary schools or who are home-schooled must satisfy paragraphs (1)-(3) of this subsection.

(5) To be eligible for enrollment in a dual credit course offered by a public college, students must meet all the college's regular prerequisite requirements designated for that course (e.g., minimum score on a specified placement test, minimum grade in a specified previous course, etc.).

(6) To be eligible for enrollment in a dual credit course offered by a public college, students must have at least junior year high school standing. Exceptions to this requirement for students with demonstrated outstanding academic performance and capability (as evidenced by grade-point average, PSAT scores, or other assessment indicators) may be approved by the principal of the high school and the chief academic officer of the college. Students with less than junior year high school standing must demonstrate eligibility as outlined under subsection (b)(1) of this section.

(7) High school students shall not be enrolled in more than two dual credit courses per semester. Exceptions to this requirement for students with demonstrated outstanding academic performance and capability (as evidenced by grade-point average, ACT or SAT scores, or other assessment indicators) may be approved by the principal of the high school and the chief academic officer of the college.

(8) An institution may impose additional requirements for enrollment in courses for dual credit that do not conflict with this section.

(9) An institution is not required, under the provisions of this section, to offer dual credit courses for high school students.

(c) Location of Class. Dual credit courses may be taught on the college campus or on the high school campus. For dual credit courses taught exclusively to high school students on the high school campus and for dual credit courses taught electronically, public colleges shall comply with applicable rules and procedures for offering courses at a distance in §§4.101 through 4.108 of this title (relating to Approval of

Distance Education and Off-Campus Instruction for Public Colleges and Universities). In addition, dual credit courses taught electronically shall comply with the Board's adopted Principles of Good Practice for Courses Offered Electronically.

(d) **Composition of Class.** Dual credit courses may be composed of dual credit students only or of dual and college credit students. Exceptions for a mixed class, which would also include high school credit-only students, may be allowed only under one of the following conditions:

(1) If the course involved is required for completion under the State Board of Education Recommended or Distinguished Achievement High School Program graduation requirements, and the high school involved is otherwise unable to offer such a course;

(2) If the high school credit-only students are advanced placement students.

(3) If the course is a career and technology/college workforce education course and the high school credit-only students are earning articulated college credit.

(e) **Faculty Selection, Supervision, and Evaluation.**

(1) The college shall select instructors of dual credit courses. These instructors must be regularly employed faculty members of the college or must meet the same standards (including minimal requirements of the Southern Association of Colleges and Schools) and approval procedures used by the college to select faculty responsible for teaching the same courses at the main campus of the college.

(2) The college shall supervise and evaluate instructors of dual credit courses using the same or comparable procedures used for faculty at the main campus of the college.

(f) **Course Curriculum, Instruction, and Grading.** The college shall ensure that a dual credit course and the corresponding course offered at the main campus of the college are equivalent with respect to the curriculum, materials, instruction, and method/rigor of student evaluation. These standards must be upheld regardless of the student composition of the class.

(g) **Academic Policies and Student Support Services.**

(1) Regular academic policies applicable to courses taught at the college's main campus must also apply to dual credit courses. These policies could include the appeal process for disputed grades, drop policy, the communication of grading policy to students, when the syllabus must be distributed, etc.

(2) Students in dual credit courses must be eligible to utilize the same or comparable support services that are afforded college students on the main campus. The college is responsible for ensuring timely and efficient access to such services (e.g., academic advising and counseling), to learning materials (e.g., library resources), and to other benefits for which the student may be eligible.

(h) **Transcribing of Credit.** For dual credit courses, high school as well as college credit should be transcribed immediately upon a student's completion of the performance required in the course.

(i) **Funding.**

(1) The state funding for dual credit courses will be available to both public school districts and colleges based on the current agreement between the Commissioner of Education and the Commissioner of Higher Education.

(2) The college may claim funding for all students getting college credit in dual credit courses.

(3) Only a public community college may waive tuition and fees for a Texas public high school student enrolled in a course for which the student may receive dual course credit. Technical colleges, state colleges, and public universities must charge tuition to dual credit students following the same guidelines used for regular students.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403036

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 27, 2004

For further information, please call: (512) 427-6114



## CHAPTER 8. CREATION, EXPANSION, DISSOLUTION, OR CONSERVATORSHIP OF PUBLIC COMMUNITY COLLEGE DISTRICTS

### SUBCHAPTER A. DEFINITIONS

#### 19 TAC §8.1

The Texas Higher Education Coordinating Board adopts amendments to §8.1, concerning creation, expansion, dissolution, or conservatorship of public community/junior college districts, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1503). Specifically, the Board adopts these amendments to update references to Board rules that have changed with the repeal and adoption of other Board rules amendments, and includes a general definition of community colleges as including junior colleges.

There were no comments received concerning these amendments.

The amendments are adopted under Texas Education Code, §§61.051(b)(c), 61.053, 61.060, 61.061, 61.062, 130.001, 130.003, and 130.004, and Chapter 130, Subchapter B and C, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for the creation of public community college districts, the dissolution of a public community college district, the approval of a branch campus maintenance tax, the approval of a branch campus, and the conservatorship of a public community college district.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403037

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114

◆   ◆   ◆

## SUBCHAPTER B. CREATION OF A PUBLIC COMMUNITY COLLEGE DISTRICT

### 19 TAC §§8.21 - 8.26, 8.29, 8.30, 8.33 - 8.36

The Texas Higher Education Coordinating Board adopts amendments to §§8.21 - 8.26, 8.29, 8.30, 8.33 - 8.36, concerning creation, expansion, dissolution, or conservatorship of public community/junior college districts without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1504). Specifically, the Board adopts these amendments to simplify references to community/junior and technical colleges as two-year colleges.

There were no comments received concerning these amendments.

The amendments are adopted under Texas Education Code, §§61.051(b)(c), 61.053, 61.060, 61.061, 61.062, 130.001, 130.003, and 130.004, and Chapter 130, Subchapter B and C, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for the creation of public community college districts, the dissolution of a public community college district, the approval of a branch campus maintenance tax, the approval of a branch campus, and the conservatorship of a public community college district.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403038

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114

◆   ◆   ◆

## SUBCHAPTER C. DISSOLUTION OF AN INACTIVE PUBLIC COMMUNITY COLLEGE DISTRICT

### 19 TAC §§8.51, 8.53 - 8.55

The Texas Higher Education Coordinating Board adopts amendments to §§8.51, 8.53 - 8.55 concerning creation, expansion, dissolution, or conservatorship of public community/junior college districts, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1506). Specifically, the Board adopts these amendments to simplify references to community/junior and technical colleges as two-year colleges.

There were no comments received concerning these amendments.

The amendments are adopted under Texas Education Code, §§61.051(b)(c), 61.053, 61.060, 61.061, 61.062, 130.001, 130.003, and 130.004, and Chapter 130, Subchapter B and C, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for the

creation of public community college districts, the dissolution of a public community college district, the approval of a branch campus maintenance tax, the approval of a branch campus, and the conservatorship of a public community college district.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403039

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114

◆   ◆   ◆

## SUBCHAPTER D. FORMATION OF A BRANCH CAMPUS

### 19 TAC §§8.72 - 8.76

The Texas Higher Education Coordinating Board adopts amendments to §§8.72 - 8.76 concerning creation, expansion, dissolution, or conservatorship of public community/junior college districts, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1507). Specifically, the Board adopts amendments to §§8.72 through 8.76 to simplify references to community/junior and technical colleges as two-year colleges, adopts amendments to §8.75 updating references to Board rules that have changed with the repeal and adoption of other Board rules amendments, and adopts an amendment to §8.74 updating a reference to a Board committee.

There were no comments received concerning these amendments.

The amendments are adopted under Texas Education Code, §§61.051(b)(c), 61.053, 61.060, 61.061, 61.062, 130.001, 130.003, and 130.004, and Chapter 130, Subchapter B and C, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for the creation of public community college districts, the dissolution of a public community college district, the approval of a branch campus maintenance tax, the approval of a branch campus, and the conservatorship of a public community college district.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403040

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114

## SUBCHAPTER E. BRANCH CAMPUS MAINTENANCE TAX

### 19 TAC §§8.91, 8.94, 8.96, 8.98

The Texas Higher Education Coordinating Board adopts amendments to §§8.91, 8.94, 8.96, and 8.98 concerning creation, expansion, dissolution, or conservatorship of public community/junior college districts, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1508). Specifically, the Board adopts amendments to §§8.91, 9.94, and 8.96 to simplify references to community/junior and technical colleges as two-year colleges and adopts amendments to §§8.96 and 8.98 to clarify procedures for counties with a population of less than 150,000 seeking approval of a branch campus maintenance tax.

There were no comments received concerning the amendments.

The amendments are adopted under Texas Education Code, §§61.051(b)(c), 61.053, 61.060, 61.061, 61.062, 130.001, 130.003, and 130.004, and Chapter 130, Subchapter B and C, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for the creation of public community college districts, the dissolution of a public community college district, the approval of a branch campus maintenance tax, the approval of a branch campus, and the conservatorship of a public community college district.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403041

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER F. CONSERVATORSHIP OF A PUBLIC COMMUNITY COLLEGE DISTRICT

### 19 TAC §§8.121 - 8.124

The Texas Higher Education Coordinating Board adopts amendments to §§8.121 - 8.124 concerning creation, expansion, dissolution, or conservatorship of public community/junior college districts, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1509). Specifically, the Board adopts amendments to §§8.121 - 8.124 to simplify references to community/junior and technical colleges as two-year colleges and adopts an amendment to §8.123 updating a reference to a Board committee.

There were no comments received concerning these amendments.

The amendments are adopted under Texas Education Code, §§61.051(b)(c), 61.053, 61.060, 61.061, 61.062, 130.001, 130.003, and 130.004, and Chapter 130, Subchapter B and C, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for the

creation of public community college districts, the dissolution of a public community college district, the approval of a branch campus maintenance tax, the approval of a branch campus, and the conservatorship of a public community college district.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403042

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## CHAPTER 9. PROGRAM DEVELOPMENT IN PUBLIC COMMUNITY/JUNIOR COLLEGE DISTRICTS AND TECHNICAL COLLEGES SUBCHAPTER A. DEFINITIONS

### 19 TAC §9.1

The Texas Higher Education Coordinating Board adopts the repeal of §9.1, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1510).

Section 9.1 provides definitions for terms used throughout the chapter. The repeal is necessary because this section is being replaced with a new §9.1 that is adopted contemporaneously in this issue of the *Texas Register*. Repealing the rule allows for a new rule which updates definitions and changes references of "community/junior college" and "technical or associate degree-granting institutions" to "two year colleges."

There were no comments received concerning the repeal of this rule.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403043

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



◆   ◆   ◆

## SUBCHAPTER B. GENERAL PROVISIONS

### 19 TAC §§9.21 - 9.31

The Texas Higher Education Coordinating Board adopts the repeal of §§9.21 - 9.31, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1510).

The repeal is necessary because these sections are being replaced with new §§9.21 - 9.31 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing these rules allow for new rules concerning the general operation of a public two-year college, such as student performance, religious holy days, training for governing boards, driver education courses, and uniform dates for adding/dropping courses pertaining to refunds.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403044  
Jan Greenberg  
General Counsel  
Texas Higher Education Coordinating Board  
Effective date: May 25, 2004  
Proposal publication date: February 20, 2004  
For further information, please call: (512) 427-6114

◆   ◆   ◆

## SUBCHAPTER C. PURPOSE, ROLE, AND MISSION

### 19 TAC §§9.51 - 9.55

The Texas Higher Education Coordinating Board adopts the repeal of §§9.51 - 9.55, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1511).

Sections 9.51 - 9.55 relate to the purpose, role, and mission of public community/junior and technical colleges. The repeal is necessary because these sections are being replaced with new §§9.51 - 9.55 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing the rules allow for new rules concerning approval, publication, and Board review of the role, mission, and purpose of public two-year colleges. The differences in the new sections and the sections adopted for repeal

relate primarily to references to "community/junior colleges" being changed to "community colleges" and references to "community/junior and technical" or "associate degree-granting institutions" being changed to "two-year colleges."

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403045  
Jan Greenberg  
General Counsel  
Texas Higher Education Coordinating Board  
Effective date: May 25, 2004  
Proposal publication date: February 20, 2004  
For further information, please call: (512) 427-6114

◆   ◆   ◆

## SUBCHAPTER D. TRANSFERABLE ACADEMIC COURSES

### 19 TAC §§9.71 - 9.77

The Texas Higher Education Coordinating Board adopts the repeal of §§9.71 - 9.77, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1512).

Sections 9.71 - 9.77 relate primarily to transferable academic courses. The repeal is necessary because these sections are being replaced with new §§9.71 - 9.77 that are adopted contemporaneously in this issue of the *Texas Register*. Repeal of these sections allow for new sections which change references of "community/junior colleges" to "community colleges" and change references of "community/junior and technical" or "associate degree-granting institutions" to "two-year colleges." New provisions regarding the Lower-Division Academic Court Guide Manual have been added. Criteria and procedures for obtaining unique need approval for certain lower-division courses have been refined.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403046

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER E. CERTIFICATE AND ASSOCIATE DEGREE PROGRAMS

### 19 TAC §§9.91 - 9.96

The Texas Higher Education Coordinating Board adopts the repeal of §§9.91 - 9.96, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1512).

Sections 9.91 - 9.96 relate to certificate and associate degree programs. The repeal is necessary because these sections are being replaced with new §§9.91 - 9.96 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing the rules will clarify and strengthen Board rules relating to certificate and degree programs at public two-year colleges. Section 9.91 and §9.93 change references of "community/junior and technical" or "associate degree-granting institutions" to "two-year colleges" and §9.95 changes references of "postsecondary institutions" to "two-year colleges and other institutions providing certificate or associate degree programs."

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403047

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER F. WORKFORCE CONTINUING EDUCATION COURSES

### 19 TAC §§9.111 - 9.117

The Texas Higher Education Coordinating Board adopts the repeal of §§9.111 - 9.117, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1513).

Sections 9.111 - 9.117 relate to workforce continuing education courses. The repeal is necessary because these sections are being replaced with new §§9.111 - 9.117 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing the rules will clarify and strengthen Board rules regarding workforce continuing education courses.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403048

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER G. CONTRACTUAL AGREEMENTS

### 19 TAC §§9.121 - 9.128

The Texas Higher Education Coordinating Board adopts the repeal of §§9.121 - 9.128, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1513).

Sections 9.121 - 9.128 relate to contractual agreements. The repeal is necessary because these sections are being replaced with new §§9.121 - 9.128 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing the rules clarify and strengthen Board rules regarding contractual agreements.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005,

130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403049

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER H. PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND PUBLIC TWO-YEAR ASSOCIATE DEGREE-GRANTING INSTITUTIONS

### 19 TAC §§9.141 - 9.144, 9.146, 9.147

The Texas Higher Education Coordinating Board adopts the repeal of §§9.141 - 9.144, 9.146, and 9.147, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1514).

Sections 9.141 - 9.144, 9.146, and 9.147 relate to partnerships between secondary schools and public two-year associate degree-granting institutions. The repeal is necessary because these sections are being replaced with new §§9.141 - 9.144, 9.146, and 9.147 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing the rules will clarify and strengthen Board rules regarding Partnerships between secondary schools and public two-year colleges.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403050

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER I. DISTANCE EDUCATION

### 19 TAC §§9.161 - 9.163

The Texas Higher Education Coordinating Board adopts the repeal of §§9.161 - 9.163, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1515).

The repeal is necessary because these sections are being replaced with new §§9.161 - 9.163 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing the rules clarify Board rules regarding distance education.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403051

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER J. ACADEMIC ASSOCIATE DEGREE PROGRAMS

### 19 TAC §§9.181 - 9.186

The Texas Higher Education Coordinating Board adopts the repeal of §§9.181 - 9.186, concerning program development in public community/junior college districts and technical colleges, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1515).

Sections 9.181 - 9.186 relate to academic associate degree programs. The repeal is necessary because these sections are being replaced with new §§9.181 - 9.186 that are adopted contemporaneously in this issue of the *Texas Register*. Repealing the

rules clarify and strengthen Board rules relating to academic associate degree programs.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403052

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## CHAPTER 9. PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES

### SUBCHAPTER A. DEFINITIONS

#### 19 TAC §9.1

The Texas Higher Education Coordinating Board adopts new §9.1, concerning program development in public two-year colleges, with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1516).

Specifically, the adopted new §9.1 updates definitions and changes references of "community/junior college and technical" or "associate degree-granting institutions" to "two year colleges."

There were no comments received concerning this new rule.

The new section is adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

#### §9.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Academic courses--Semester credit courses included or allowed under the provisions of the Lower-Division Academic Course Guide Manual designed for college transfer to institutions of higher education in completion of associate and baccalaureate degree programs.

(2) Associate degree program--A grouping of courses designed to lead the individual directly to employment in a specific career,

or to transfer to an upper-level baccalaureate program. This specifically refers to the associate of arts, associate of science, associate of applied arts, associate of applied science, and the associate of occupational studies degrees. The term "applied" in an associate degree name indicates a program designed to qualify students for immediate employment.

(3) Board or Coordinating Board--The Texas Higher Education Coordinating Board.

(4) Certificate program--Workforce programs designed for entry-level employment or for upgrading skills and knowledge within an occupation. Certificate programs serve as building blocks and exit points for AAS degree programs.

(5) Commissioner of Higher Education or Commissioner--The chief executive officer of the Texas Higher Education Coordinating Board.

(6) Concurrent course credit--See "Dual credit."

(7) Continuing education unit or CEU--Ten (10) contact hours of participation in an organized continuing education experience under responsible sponsorship, capable direction, and qualified instruction, as outlined in the Guidelines for Instructional Programs in Workforce Education.

(8) Contractual agreements--Agreements or contracts between public two-year colleges and one of the following:

(A) a non-SACS/COC-accredited organization, for postsecondary instructional services that could not be offered otherwise;

(B) a public secondary school, for instructional services that could not be offered otherwise; or

(C) another SACS/COC-accredited institution of higher education, whether public or independent.

(9) Contract instruction--Postsecondary workforce education and training in which specific instruction is provided by a public two-year college or a non-SACS/COC-accredited organization to a contracting entity. This arrangement is utilized when conventional methodology or instructional systems are difficult or impossible to obtain.

(10) Developmental courses--Courses designed to correct academic deficiencies and bring students' skills to an appropriate level for entry into college.

(11) Distance education--Classes in which the majority of the instruction occurs when the student and instructor are not in the same physical setting. A class is considered a distance education class if students receive more than one-half of the instruction at a distance. Distance education can be delivered synchronously or asynchronously to any single or multiple location(s):

(A) other than the "main campus of a senior institution (or "on campus"), where the primary office of the chief executive officer of the campus is located;

(B) outside the boundaries of the taxing authority of a community college district; or

(C) via instructional telecommunications to any other distance location, including electronic delivery of all types.

(12) Dual credit--A process by which a high school student enrolls in a college course and receives simultaneous academic credit for the course from both the college and the high school. While dual credit courses are often taught on the secondary school campus to high

school students only, §4.84 of this title (relating to Institutional Agreements) and §4.85 of this title (relating to Dual Credit Requirements), also apply when a high school student takes a course on the college campus and receives both high school and college credit. Dual credit is also referred to as concurrent course credit; the terms are equivalent. However, dual (or concurrent) enrollment refers to a circumstance in which a student is enrolled in more than one educational institution (including a high school and a college).

(13) Guidelines for Instructional Programs in Workforce Education (GIPWE)--A Coordinating Board approved publication containing policies and procedures related to the proposal and approval of workforce education courses and programs for Texas public institutions.

(14) Governing board--The body charged with policy direction of any public community college district, the technical college system, public state college, public senior college or university, career school or college, or other educational agency including but not limited to boards of directors, boards of regents, boards of trustees, and independent school district boards.

(15) Governing board, tech-prep consortium--Consists of a minimum of representatives of each educational entity that participates in a Tech-Prep consortium which determines the policies and operations of the Tech-Prep consortium in accordance with its written by-laws and fiscal agency and personnel agreements. A representative may represent multiple entities as agreed upon by the participating consortium members.

(16) Guidelines for Instructional Programs in Workforce Education (GIPWE)--A Coordinating Board-approved publication containing policies and procedures related to the design, development, proposal, approval, operation, and evaluation of workforce education courses and programs for Texas public institutions of higher education and career schools and colleges.

(17) Independent institution of higher education--A private or independent college or university that is:

(A) organized under the Texas Non-Profit Corporation Act;

(B) exempt from taxation under Article V, §2, of the Texas Constitution and §501(c)(3) of the Internal Revenue Code; and

(C) accredited by the Southern Association of Colleges and Schools Commission on Colleges.

(18) Lower-Division Academic Course Guide Manual (ACGM)--A Coordinating Board-approved publication listing academic courses that public two-year colleges can teach and report for contact hour reimbursement from state appropriations without special approval from the Board.

(19) Public community college--Any public junior college or public community college as defined in Texas Education Code, §61.003 and §130.005, and whose role, mission, and purpose is outlined in Texas Education Code, §130.0011 and §130.003.

(20) Public two-year college--Any public junior college, public community college, public technical college, or public state college as defined in Texas Education Code, §61.003.

(21) Related-instruction--Relates to §9.27 of this title (relating to Related-Instruction for Apprenticeship Programs), organized off-the-job classroom instruction in theoretical or technical subjects required for the completion of an apprenticeship program.

(22) Remedial and compensatory--All courses designated as developmental or remedial in the Lower-Division Academic Course

Guide Manual. These courses are designed to address academic deficiencies and may not be offered for college degree credit.

(23) Remedial courses--Courses for high school students designed to correct academic deficiencies and bring students' skills to an appropriate level for graduation from high school.

(24) SACS/COC--The Southern Association of Colleges and Schools Commission on Colleges.

(25) Technical courses or programs--Workforce education courses or programs for which semester/quarter credit hours are awarded.

(26) Tech-Prep consortium--A collaboration of educational entities and, at local option, employer and labor organizations, and universities defined under the Carl D. Perkins Vocational and Technical Education Act, as amended, and the Texas Education Code, Chapter 61, Subchapter T, Tech-Prep Education (hereinafter referred to as "the Code"), which work together to implement a Tech-Prep program.

(27) Unique need academic course--An academic course created by a college to satisfy a unique need and designed to transfer into a baccalaureate program.

(28) Vocational courses or programs--Workforce education courses or programs for which continuing education units (CEUs) are awarded.

(29) Workforce continuing education course--A course offered for continuing education units (CEUs) with an occupationally specific objective and supported by state funding. A workforce continuing education course differs from a community service course offered for recreational or avocational purposes and is not supported by state funding.

(30) Workforce education--Technical courses and programs for which semester/quarter credit hours are awarded, and vocational courses and programs for which continuing education units are awarded. Workforce education courses and programs prepare students for immediate employment or job upgrade within specific occupational categories.

(31) Workforce Education Course Manual (WECM)--An online database composed of the Coordinating Board's official statewide inventory of workforce education courses available for two-year public colleges to use in certificate and associate degree programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403053

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114

## SUBCHAPTER B. GENERAL PROVISIONS

### 19 TAC §§9.21 - 9.31

The Texas Higher Education Coordinating Board adopts new §§9.21 - 9.31, concerning program development in public two-year colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1518).

Specifically, the new §§9.21 - 9.31 relate to program development in public two-year colleges and to the general operation of a public two-year college, such as student performance, religious holy days, training for governing boards, driver education courses, and uniform dates for adding/dropping courses pertaining to refunds. The differences in these new sections and the sections adopted for repeal relate to changes in references of "community/junior and technical" or associate degree-granting institutions" to "two-year colleges." Sections 9.23, 9.24, and 9.31 reflect changes in cross-references to other Board rules.

There were no comments received concerning the new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403054

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER C. PURPOSE, ROLE, AND MISSION

### 19 TAC §§9.51 - 9.55

The Texas Higher Education Coordinating Board adopts new §§9.51 - 9.55, concerning program development in public two-year colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1519).

Specifically, the new §§9.51 - 9.55 concern approval, publication, and Board review of the role, mission, and purpose of public two-year colleges. The differences in these new sections and the sections being adopted for repeal relate primarily to references to "community/junior colleges" being changed to "community colleges" and references to "community/junior and technical" or "associate degree-granting institutions" being changed to "two-year colleges."

There were no comments received concerning these new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003,

130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403055

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER D. TRANSFERABLE ACADEMIC COURSES

### 19 TAC §§9.71 - 9.77, 9.80

The Texas Higher Education Coordinating Board adopts new §§9.71 - 9.77 and §9.80, concerning program development in public two-year colleges. Section 9.74 is adopted with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1520). Sections 9.71 - 9.73, 9.75 - 9.77, and 9.80 are adopted without changes to the proposed text and will not be republished.

Specifically, the new §§9.71 - 9.77 and §9.80 concern transferable academic courses. The differences in these new sections and the sections being adopted for repeal relate to changes in references of "community/junior colleges" to "community colleges" in §9.73 and changes in references of "community/junior and technical" or "associate degree-granting institutions" to "two-year colleges" in §9.71 and §9.75. New §9.73 adds a provision relating to the inclusion of field of study courses in the Lower-Division Academic Course Guide Manual. Section 9.74 strengthens the criteria and procedures for obtaining unique need approval for certain lower-division courses and §9.77 requires public two-year colleges to notify students who are academic majors of limitations on the number of lower-division semester credit hours that may be accepted in transfer prior to the student's successful completion of 39 semester credit hours of academic coursework. Section 9.80 provides that no funds appropriated to any public two-year college may be expended for any unique need course which has not been approved by Board staff.

Comments were received concerning the new rules as follows:

Comments: Two comments were received from the Lower Division Academic Course Guide Manual Advisory Committee that would affect §9.74. The Committee recommended the following in the minutes of their meeting of February 27, 2004:

(1) Change "regional" to "Texas and/or regional" (in §9.74(a)(2)(A)); and

(2) Change the expiration date for continuing Unique Need courses approved prior to September 1, 2004 from "five" to "three" years after approval.

Response: The Board staff concurs with the addition of "Texas and/or" prior to "regional university" in subsection (a)(2)(A) and changes were made accordingly. However, the staff does not concur with the proposed change to subsection (d) from "five" to "three" years the number of years on the expiration date for courses approved prior to September 1, 2004. This would be a substantive change requiring that the rules be re-proposed; moreover, it would be an after-the-fact reversal of the rules that have been in place, which permit a five-year continuing unique need approval. Because very few continuing Unique Need courses have been approved in the last two years, there is little risk that a transitional period for the new three-year restrictions will be harmful to students. The staff recommendation is to let the proposed wording stand.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

*§9.74. Unique Need Courses.*

(a) An academic course may be approved for unique need if it meets the following criteria:

(1) The course must have college-level rigor. A course designed to meet a community service, leisure, vocational, or avocational need is inappropriate for unique need approval and state appropriations.

(2) The course must be acceptable for transfer and apply toward a baccalaureate degree. In order to satisfy this requirement, the course must meet at least one of the following requirements:

(A) The course has a documented course equivalent at a minimum of two Texas and/or regional universities; or

(B) The course will be accepted in satisfaction of either general education or degree program requirements at a minimum of two regional universities.

(3) Exceptions may be granted for courses that transfer to a single regional university if the college documents that a large number of its students transfer to that institution and the course is part of a current, documented articulation agreement between the two-year college and the regional university.

(b) Procedures for unique need approval.

(1) The application for each unique need course submitted must be accompanied by a statement of need for the course and a syllabus which includes a course description, detailed course outline, and objectives. Except as specified in subsection (a)(3) of this section, the application must be accompanied by letters from regional universities that clearly indicate the basis for transferability of the course (as a course equivalent, general education course, or academic major course).

(2) Once approved, a unique need course shall be placed on the college inventory for three years. Colleges must reapply for approval of unique need courses every three years.

(c) Courses listed in the Lower-Division Academic Course Guide Manual but offered for a greater number of contact hours or semester credit hours than specified must be submitted for unique need approval.

(d) Courses approved as continuing unique need courses prior to September 1, 2004 shall expire five years from the date of approval.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403056

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER E. CERTIFICATE AND ASSOCIATE DEGREE PROGRAMS

### 19 TAC §§9.91 - 9.96

The Texas Higher Education Coordinating Board adopts new §§9.91 - 9.96, concerning program development in public two-year colleges. Section 9.92 is adopted with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1522). Section 9.91 and §§9.93 - 9.96 are adopted without changes and will not be republished.

Specifically, the new §§9.91 - 9.96 clarify and strengthen Board rules relating to certificate and degree programs at public two-year colleges. Section 9.91 and §9.93 change references of "community/junior and technical" or "associate degree-granting institutions" to "two-year colleges" and §9.95 changes references of "postsecondary institutions" to "two-year colleges and other institutions providing certificate or associate degree programs."

There were no comments received concerning the new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060 - 61.063, 61.084, 130.001(b)(3) and (4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of public two-year colleges.

*§9.92. Authority.*

The Texas Education Code, §§61.003, 61.051(e)(f), 61.0513, 61.053, 61.054, 61.055, 61.061, 61.062(c) - (d), 61.075, 130.001(b)(3) - (4), 130.003(e)(1), (2), (3) and (7) and 135.04, authorize the Coordinating Board to adopt policies, enact regulations, and establish rules for the coordination of postsecondary technical and vocational certificate and associate degree programs eligible for state appropriations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403057

Jan Greenberg  
General Counsel  
Texas Higher Education Coordinating Board  
Effective date: May 25, 2004  
Proposal publication date: February 20, 2004  
For further information, please call: (512) 427-6114



## SUBCHAPTER F. WORKFORCE CONTINUING EDUCATION COURSES

### 19 TAC §§9.111 - 9.117

The Texas Higher Education Coordinating Board adopts new §§9.111 - 9.117, concerning program development in public two-year colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1523). Specifically, the new sections clarify and strength Board rules regarding workforce continuing education courses. New §§9.111, 9.112, 9.114, and 9.116 change references of "community/junior and technical" or "associate degree-granting institutions" to "two-year colleges." New §9.113 adds an exception to the continuing education program limits in §9.113 and new §9.115 clarifies the kinds of continuing education courses that are eligible for state appropriations.

There were no comments received concerning the new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060-61.063, 61.084, 130.001(b)(3)-(4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of a public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403058  
Jan Greenberg  
General Counsel  
Texas Higher Education Coordinating Board  
Effective date: May 25, 2004  
Proposal publication date: February 20, 2004  
For further information, please call: (512) 427-6114



## SUBCHAPTER G. CONTRACTUAL AGREEMENTS

### 19 TAC §§9.121 - 9.128

The Texas Higher Education Coordinating Board adopts new §§9.121 - 9.128, concerning program development in public two-year colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1523). Specifically, the new sections clarify and strengthen Board rules regarding contractual agreements. These rules set out the procedures for approval and reporting of contractual agreements with other institutions. Section 9.128

provides that no appropriated funds may be expended for any course which has not been approved by the Commissioner of Higher Education, even if such course is taught under a contractual agreement. Section 9.126 reflects new cross-references to other Board rules. Sections 9.121 - 9.126 change references of "community/junior colleges" to "community colleges."

There were no comments received concerning the new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060-61.063, 61.084, 130.001(b)(3)-(4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of a public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403059  
Jan Greenberg  
General Counsel  
Texas Higher Education Coordinating Board  
Effective date: May 25, 2004  
Proposal publication date: February 20, 2004  
For further information, please call: (512) 427-6114



## SUBCHAPTER H. PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND PUBLIC TWO-YEAR COLLEGES

### 19 TAC §§9.141 - 9.144, 9.146, 9.147

The Texas Higher Education Coordinating Board adopts new §§9.141 - 9.144, 9.146, and 9.147, concerning program development in public two-year colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1526). Specifically, the new sections clarify and strengthen Board rules regarding partnerships between secondary schools and public two-year colleges. Section 9.143 updates cross-references to other Board rules and §§9.141 - 9.144 change references of "community/junior colleges" to "community colleges." Section 9.143 and §9.146 align college-readiness assessment requirements with the Texas Assessment of Academic Skills and Board rules on the Texas Success Initiative in §9.143 and §9.146.

There were no comments received concerning the new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060-61.063, 61.084, 130.001(b)(3)-(4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of a public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.



Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403060

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER I. DISTANCE EDUCATION

### 19 TAC §§9.161 - 9.163

The Texas Higher Education Coordinating Board adopts new §§9.161 - 9.163, concerning program development in public two-year colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1528). Specifically, the new sections clarify Board rules regarding distance education. New §9.163 relates to the approval of courses and programs offered through distance education and is identical to the section adopted for repeal except for an updated reference to other Board rules.

There were no comments received concerning the new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060-61.063, 61.084, 130.001(b)(3)-(4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of a public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403061

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER J. ACADEMIC ASSOCIATE DEGREE PROGRAMS

### 19 TAC §§9.181 - 9.186

The Texas Higher Education Coordinating Board adopts new §§9.181 - 9.186, concerning program development in public two-year colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1528). Specifically, the new sections clarify and strengthen Board rules relating to academic associate degree programs. Section 9.183 prescribes the degree titles, program length, and program content of Academic Associate Degree Programs. Sections 9.183 and 9.184 require approval of the Board

and reporting to the Board of those programs. Section 9.186 provides that no appropriated funds to any public two-year college or other public institution providing certificate or associate degree may be expended for an academic associate degree program that is not in compliance with these rules by August 1, 2004.

There were no comments received concerning these new rules.

These new sections are adopted under the Texas Education Code, §§51.308, 51.403(e), 51.911, 61.051, 61.053, 61.059, 61.060-61.063, 61.084, 130.001(b)(3)-(4), 130.003, 130.005, 130.0051, 130.008, and 130.009, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules for various functions relating to program development and the general operation of a public two-year colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403062

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## CHAPTER 10. INSTITUTIONAL EFFECTIVENESS IN PUBLIC TWO-YEAR COLLEGES

### SUBCHAPTER A. PURPOSE, AUTHORITY, AND DEFINITIONS

#### 19 TAC §§10.1 - 10.3

The Texas Higher Education Coordinating Board adopts amendments to §§10.1 - 10.3 concerning institutional effectiveness in public community/junior and technical colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1529). Specifically, the Board adopts these amendments to replace references to "community/junior and technical colleges" with references to "two-year colleges"; and adding "public" to appropriate references to other institutions.

There were no comments received concerning the amendments.

The amendments are adopted under Texas Education Code, §§61.051(e)(f)(g)(k)(n)(o), 61.054, 61.055, 61.061, 61.062(c)(d)(e), 61.063, 61.0651, 61.066, 130.001(b)(3)-(5), 130.003, and 135.01, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to provide for the review of the institutional effectiveness of programs, services, and standards of operation for Texas public two-year colleges and other institutions providing certificate and associate degree programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403063

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER B. GENERAL PROVISIONS

### 19 TAC §10.23

The Texas Higher Education Coordinating Board adopts amendments to §10.23, concerning institutional effectiveness in public community/junior and technical colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1530). Specifically, the Board adopts these amendments to replace references to "community/junior and technical colleges" with references to "two-year colleges;" and adding "public" to appropriate references to other institutions.

There were no comments received concerning the amendments.

The amendments are adopted under Texas Education Code, §§61.051(e)(f)(g)(k)(n)(o), 61.054, 61.055, 61.061, 61.062(c)(d)(e), 61.063, 61.0651, 61.066, 130.001(b)(3)-(5), 130.003, and 135.01, which provides the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to provide for the review of the institutional effectiveness of programs, services, and standards of operation for Texas public two-year colleges and other institutions providing certificate and associate degree programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403064

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## CHAPTER 12. CAREER SCHOOLS AND COLLEGES

### SUBCHAPTER A. PURPOSE, AUTHORITY, AND DEFINITIONS

#### 19 TAC §§12.1 - 12.3

The Texas Higher Education Coordinating Board adopts the repeal of §§12.1 - 12.3, concerning career schools and colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1531). These sections relate to the purpose, authority, and definitions of career schools and colleges. The repeal is necessary because

this section is being replaced with new §§12.1 - 12.3 that are published contemporaneously in this issue of the *Texas Register*. Repealing the rule allows for new rules updating definitions and updating a reference to other Board rules as the result of the repeal and adoption of Board rules in previous Board meetings.

There were no comments received concerning the repeal of the rules.

The repeal is adopted under the Texas Education Code, Chapter 132, §132.063, and Chapter 61, Subchapter G, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403029

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



#### 19 TAC §§12.1 - 12.3

The Texas Higher Education Coordinating Board adopts new §§12.1 - 12.3, concerning career schools and colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1532). Specifically, the new sections update a reference in §12.3 to other Board rules as the result of the repeal and adoption of Board rules in previous Board meetings and update definitions in §12.3.

There were no comments received concerning these new rules.

The new sections are adopted under the Texas Education Code, Chapter 132, §132.063, and Chapter 61, Subchapter G, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403032

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER B. GENERAL PROVISIONS

### 19 TAC §§12.21 - 12.39

The Texas Higher Education Coordinating Board adopts the repeal of §§12.21 - 12.39, concerning career schools and colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1534). These sections provide the general provisions relating to career schools and colleges. The repeal is necessary because these sections are being replaced with new §§12.21 - 12.39 that are published contemporaneously in this issue of the *Texas Register*. Repealing the rules will reorganize several sections within the subchapter to be more coherent and corrects grammar and syntax; update references to other Board rules in §§12.21, 12.23, 12.29, 12.34, 12.37, 12.38 as the result of the repeal and adoption of Board rules in previous Board meetings; clarify what constitutes travel expenses of Board staff in §12.22; expand degree program approval to include approval of courses leading to an associate degree in §12.25 and §12.26; clarify the distinction between the authority to grant degrees and individual degree program approval in §12.25; provide a codified mechanism by which schools already offering degrees in Texas can open new campuses in §12.25; clarify the Commissioner's actions on a Certificate of Authority (COA) in §12.26; clarify the complaint process in §12.35; clarify the procedure for acting upon adverse findings resulting from a site visit in §12.37; provide for a one-year period in which a school may not submit new degree program applications when the Commissioner has withdrawn or suspended or a school has voluntarily surrendered or suspended the school's COA for non-compliance in §12.37; provide direction for schools that close unexpectedly in §12.38; and clarify the teach-out provision in §12.38.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, Chapter 132, §132.063, and Chapter 61, Subchapter G, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403030

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



### 19 TAC §§12.21 - 12.39

The Texas Higher Education Coordinating Board adopts new §§12.21 - 12.39, concerning career schools and colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1534). Specifically, the new sections reorganize several sections within the

subchapter to be more coherent and corrects grammar and syntax; update references to other Board rules in §§12.21, 12.23, 12.29, 12.34, 12.37, 12.38 as the result of the repeal and adoption of Board rules in previous Board meetings; clarify what constitutes travel expenses of Board staff in §12.22; expand degree program approval to include approval of courses leading to an associate degree in §12.25 and §12.26; clarify the distinction between the authority to grant degrees and individual degree program approval in §12.25; provide a codified mechanism by which schools already offering degrees in Texas can open new campuses in §12.25; clarify the Commissioner's actions on a Certificate of Authority (COA) in §12.26; clarify the complaint process in §12.35; clarify the procedure for acting upon adverse findings resulting from a site visit in §12.37; provide for a one-year period in which a school may not submit new degree program applications when the Commissioner has withdrawn or suspended or a school has voluntarily surrendered or suspended the school's COA for non-compliance in §12.37; provide direction for schools that close unexpectedly in §12.38; and clarify the teach-out provision in §12.38.

There were no comments received concerning the new rules.

The new sections are adopted under the Texas Education Code, Chapter 132, §132.063, and Chapter 61, Subchapter G, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403033

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER C. ASSOCIATE DEGREE PROGRAMS

### 19 TAC §§12.41 - 12.46

The Texas Higher Education Coordinating Board adopts the repeal of §§12.41 - 12.46, concerning career schools and colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (28 TexReg 1540). These sections relate to associate degree programs. The repeal is necessary because these sections are being replaced with new §§12.41 - 12.46 that are published contemporaneously in this issue of the *Texas Register*. Repealing these sections will reorganize several sections within the subchapter to be more coherent and corrects grammar and syntax; update references to other Board rules in §12.45 and §12.46 as the result of the repeal and adoption of Board rules in previous Board meetings; and include a provision concerning deficiencies in institutional practices or degree programs in §12.46.

There were no comments received concerning the repeal of these rules.

The repeal is adopted under the Texas Education Code, Chapter 132, §132.063, and Chapter 61, Subchapter G, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403031

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## 19 TAC §§12.41 - 12.46

The Texas Higher Education Coordinating Board adopts new §§12.41 - 12.46, concerning career schools and colleges, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (28 TexReg 1540). Specifically, the new sections reorganize several sections within the subchapter to be more coherent and correct grammar and syntax; update references to other Board rules in §12.45 and §12.46 as the result of the repeal and adoption of Board rules in previous Board meetings; and include a provision concerning deficiencies in institutional practices or degree programs in §12.46.

There were no comments received concerning the new rules.

The new sections are adopted under the Texas Education Code, Chapter 132, §132.063, and Chapter 61, Subchapter G, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2004.

TRD-200403034

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 25, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## CHAPTER 13. FINANCIAL PLANNING

### SUBCHAPTER A. DEFINITIONS

## 19 TAC §13.1

Texas Higher Education Coordinating Board adopts amendments to §13.1 of Board rules, concerning financial planning, with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1542-1547). Specifically, the amendments to §13.1 are being made to provide additional definitions that will clarify the Board's rules for financial planning.

The following comments were received regarding the amendments:

Comment: Regarding §13.1(5) and (23), Tyler Junior College requested that staff consider eliminating the reference to a contact hour being "60 minutes" because "other Board documents use 50 minutes of direct instruction in their definition."

Response: Upon researching the issue, staff could find only one other document, Guidelines for Instructional Programs in Workforce Education, with a contact hour definition (see Glossary, page 5), and this document uses the identical definition to that proposed. No other definitions could be located. No changes were made as a result of this comment.

Comment: One commenter requested that a definition for Developmental Education be added to §13.1.

Response: The Board agrees with this comment and a definition for Developmental Education was added as §13.1(8) and subsequent definitions were renumbered.

The amendments to §13.1 of Board rules are adopted under the Texas Education Code, §§61.059, 51.307, 51.3062, and 61.027, which gives the Coordinating Board the authority to devise, establish and periodically review and revise formulas for the use of the Governor and the Legislative Budget Board in making appropriations recommendations to the Legislature, to adopt necessary rules, and to implement the provisions of the Texas Success Initiative.

### §13.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Auxiliary Enterprise--Activities providing a service to students, faculty, or staff for a fee directly related to, although not necessarily equal to, the cost of the service.

(2) Available University Fund (AUF)--A fund established in Article 7, §18, of the Texas Constitution to receive all interest and earnings of the Permanent University Fund and used to pay the debt service on PUF-backed bonds.

(3) Base Year--the semesters comprising the year of contact hours used for applying the formula funding distribution to the colleges and universities (usually the summer and fall of even years and the spring of odd years).

(4) Board or Coordinating Board--The Texas Higher Education Coordinating Board.

(5) Contact Hour--A time unit of instruction used by community, technical, and state colleges consisting of 60 minutes, of which 50 minutes must be direct instruction.

(6) Current Operating Funds--Unrestricted (appropriated) funds, designated funds, restricted funds, and auxiliary enterprise funds.

(7) Developmental Coursework--Non-degree-credit courses designed to address a student's deficiencies.

(8) Developmental Education--Courses, tutorials, laboratories, or other efforts to bring student skills in reading, writing, and mathematics to entering college level. English as a Second Language (ESL) courses may be considered developmental education, but only when they are used to bring student skill levels in reading or writing to entering college level. The term as used in this chapter does not include courses in study skills or thinking skills.

(9) Formula Funding--The method used to allocate appropriated sources of funds among institutions of higher education.

(10) Functional categories--Instruction, research, public service, academic support, student service, institutional support, operation and maintenance of plant, and hospital as defined by NACUBO.

(11) General Academic Teaching Institution--Any college, university, or institution so classified in Chapter 61, Texas Education Code, or created and so classified by law.

(12) General Revenue (GR)--State tax revenue

(13) Governmental Accounting Standards Board (GASB)--An entity created by the Financial Accounting Foundation to set accounting standards for governmental entities including public institutions of higher education.

(14) Higher Education Assistance Fund (HEAF)--A fund established in Article 7, §17, of the Texas Constitution to fund capital improvements and capital equipment for institutions not included in the Permanent University Fund.

(15) Institution of Higher Education or Institution--any public technical institute, public junior college, public senior college or university, medical or dental unit or other agency of higher education as defined in this section.

(16) Institutional Expenditures--All costs of activities separately organized and operated in connection with instructional departments primarily for the purpose of giving professional training to students as a necessary part of the educational work of the related departments.

(17) Institutional Funds--Fees, gifts, grants, contracts, and patient revenue, not appropriated by the legislature.

(18) Local Funds--Tuition, certain fees, and other educational general revenue appropriated by the legislature.

(19) National Association of College and University Business Officers (NACUBO)--Provides guidance in business operations of higher education institutions.

(20) Non-Degree-Credit Developmental Courses--Courses intended for remedial or compensatory education that bear only institutional credit and are not counted toward the total for a degree or certificate program.

(21) Permanent University Fund (PUF)--A fund established in Article 7, §11, of the Texas Constitution to fund capital improvements and capital equipment at certain institutions of higher education.

(22) Public Junior College, Public Technical Institute, or Public State College--Any college or institute so classified in the Texas Education Code, §61.003, or created and so classified by law.

(23) Semester Credit Hour--A unit of measure of instruction consisting of 60 minutes, of which 50 minutes must be direct instruction, over a 15-week period in a semester system or a 10-week period in a quarter system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402995

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER B. FORMULA FUNDING

### 19 TAC §§13.20 - 13.24

The Texas Higher Education Coordinating Board adopts amendments to §§13.20 - 13.24, concerning financial planning, with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1542-1547). Specifically, §13.20 is amended to add an exception from funding for certain semester credit hours or contact hours and §13.21 is amended, to provide authority for implementation of the Texas Success Initiative. Section 13.22 is amended to correct the dates that formula committee recommendations are due, to whom they are to be delivered, and requiring the formula advisory committees to identify funding incentives that would encourage implementations of Closing the Gaps by 2015. The name of the report from All Funds Expenditure Study has been changed to Report of Fundable Operating Expenses, and "expense" for "expenditure" has been substituted throughout the section to comply with the provisions of Government Accounting Standards Board Statements #34 and #35. Section 13.22, and §§13.23 and 13.24 are amended, to add the Legislature to the recipient list for the formula recommendations, to change the due date to June 1 of each even-numbered year, and to require the formula advisory committees to identify funding incentives that would encourage implementation of the state's five-year master plan by institutions of higher education.

The following comments were received regarding the amendments and new sections:

Comment: Regarding §13.22(b), the Coordinating Board's Community College Annual Financial Report Working Group recommended renaming the All Funds Expenditures Study to the Report of Fundable Operating Expenses to reflect more accurately the content of the report and to bring the funding categories into alignment with their annual financial reports, which will improve reporting efficiencies for the community colleges. The Working Group also recommended changing the word "expenditure" to "expense" wherever it appears, to align with Government Accounting Standards Board Statement 35 accounting requirements.

Response: The Board agrees with these comments and changes to §13.22(b) were made as a result of these comments.

Comment: Austin Community College, Collin County Community College District, Dallas Community College District, and the Texas Association of Community College Business Officers also submitted comments regarding the community colleges' ability

to charge additional fees when enrolled students take courses for the third time that cannot be counted for formula funding.

Response: The Board does not have the authority to permit an institution to charge additional fees and the legislation is silent on this issue. No changes were made as a result of this comment.

The amendments to §§13.20, 13.21, 13.22, 13.23, and 13.24 are adopted under the Texas Education Code, §§61.059, 51.307, 51.3062, and 61.027, which gives the Coordinating Board the authority to devise, establish and periodically review and revise formulas for the use of the Governor and the Legislative Budget Board in making appropriations recommendations to the Legislature, to adopt necessary rules, and to implement the provisions of the Texas Success Initiative.

*§13.20. Purpose.*

The purpose of this subchapter is to establish procedures for making formula funding recommendations to the Governor and the Legislature and to except from such funding certain semester credit hours or contact hours.

*§13.21. Authority.*

Texas Education Code, §61.059 directs the Texas Higher Education Coordinating Board to review and revise formulas for use of the Governor and the Legislative Budget Board in making appropriations recommendations. Texas Education Code, §51.307, authorizes the Board to implement the provisions of the Texas Success Initiative.

*§13.22. Community and Technical College Formulas.*

(a) Formula Advisory Committee.

(1) Not later than September 1 of each odd-numbered year, the Commissioner shall appoint an advisory committee to review the funding formulas used by the Governor and the Legislature for making appropriations to community and technical colleges.

(2) The formula advisory committee appointed by the Commissioner shall consist of senior administrators at Texas public community or technical colleges, members of the faculty, and members of the general public.

(3) The committee shall elect its own chair and vice chair.

(4) Meetings of the committee shall be open to the public. The committee shall publish minutes of all meetings, and the minutes shall be public documents.

(5) The committee shall identify funding incentives that would encourage implementation by community and technical colleges of the state's plan for higher education as specified in the Texas Education Code, §61.051(a-3).

(6) The committee shall provide an opportunity for institutions, the general public and other interested persons to provide testimony.

(7) The committee shall make its recommendations to the Commissioner no later than the February 1 of the year following its appointment.

(b) Report of Fundable Operating Expenses.

(1) The Board shall conduct a study of expenses at community colleges, Texas State Technical College, and Texas State University System two-year institutions each year.

(2) The study shall encompass all expenses made by these institutions for instruction and administration from all sources of funds including appropriated general revenue, tuition and fees, contract instruction, other educational and general revenue, local tax revenue, and restricted gifts and grants.

(3) Each college shall report total instructional expenses and contact hours for each instructional discipline included on a list provided by the Coordinating Board and total expenses for administration, including institutional support, student services, library, instructional administration, organized activities, instructional staff benefits and excluding physical plant employees.

(4) From this information, the Board shall calculate median costs for each instructional discipline.

(c) Community and Technical College Formula Recommendation.

(1) At the quarterly meeting of the Coordinating Board in April of even-number years, the Commissioner shall recommend a funding formula for the next biennium for community and technical colleges. The Commissioner shall also report the recommendations of the formula advisory committee.

(2) In making recommendations, the Commissioner shall consider the results of the all funds expenditure study, the financial needs of affected institutions, funding provided for equivalent courses in general academic institutions and for peer institutions in other states, and other factors as appropriate.

(3) The Commissioner shall recommend a general revenue appropriation for instruction and administration for community colleges and the Texas State Technical College System and two-year colleges in the Texas State University System. The Legislative Budget Board staff converts the general revenue formula for Texas State Technical College System and two-year colleges in the Texas State University System into an all funds appropriation based on their estimated educational and general income.

(4) After adoption, the Commissioner shall transmit the Board's recommendations to the Governor, the Legislature, and the Legislative Budget Board no later than June 1 of each even-numbered year.

*§13.23. General Academic Institution Formulas.*

(a) Formula Advisory Committee.

(1) Not later than September 1 of each odd-numbered year, the Commissioner shall appoint an advisory committee to review the funding formulas used by the Governor and the Legislature for making appropriations to general academic institutions.

(2) The formula advisory committee appointed by the Commissioner shall consist of senior administrators at Texas general academic institutions, members of the faculty, and members of the general public.

(3) The committee shall elect its own chair and vice chair.

(4) Meetings of the committee shall be open to the public. The committee shall publish minutes of all meetings, and the minutes shall be public documents.

(5) The committee shall identify funding incentives that would encourage implementation by general academic institutions of the state's plan for higher education as specified in the Texas Education Code, §61.051(a-3).

(6) The committee shall provide an opportunity for institutions, the general public and other interested persons to provide testimony.

(7) The formula advisory committee may appoint two study committees, one for the instructional and operations formula and another for the infrastructure formula. The study committees may include members from the formula advisory committees and other

institutional representatives as appropriate. The infrastructure study committee will include at least one representative from the Texas State Technical College System or the two-year colleges in the Texas State University System.

(8) The formula study committees shall make their recommendations to the formula advisory committee no later than the January 15 of the year following its appointment.

(9) The formula advisory committee shall make its recommendations to the Commissioner no later than the February 1 of the year following its appointment.

(b) General Academic Institution Formula Recommendation.

(1) At the quarterly meeting of the Coordinating Board in April of even-number years, the Commissioner shall recommend a funding formula for the next biennium for general academic institutions. The Commissioner shall also report the recommendations of the formula advisory committee.

(2) In making recommendations, the Commissioner shall consider the financial needs of affected institutions, funding levels at peer institutions in other states, and other factors as appropriate.

(3) The Commissioner shall recommend an all funds appropriation.

(4) After adoption, the Commissioner shall transmit the Board's recommendations to the Governor, the Legislature, and the Legislative Budget Board no later than June 1 of each even-numbered year.

**§13.24. Health-Related Institution Formulas.**

(a) Formula Advisory Committee.

(1) Not later than September 1 of each odd-numbered year, the Commissioner shall appoint an advisory committee to review the funding formulas used by the Governor and the Legislature for making appropriations to health-related institutions.

(2) The formula advisory committee appointed by the Commissioner shall consist of one representative of each public health-related institution.

(3) The committee shall elect its own chair and vice chair.

(4) Meetings of the committee shall be open to the public. The committee shall publish minutes of all meetings, and the minutes shall be public documents.

(5) The committee shall identify funding incentives that would encourage implementation by health-related institutions of the state's plan for higher education as specified in the Texas Education Code, §61.051 (a-3).

(6) The committee shall provide an opportunity for institutions, the general public and other interested persons to provide testimony.

(7) The formula advisory committee may appoint two study committees, one for the instructional and operations formula and another for the infrastructure formula. The study committees may include members from the formula advisory committees and other institutional representatives as appropriate.

(8) The formula study committees shall make their recommendations to the formula advisory committee no later than the January 15 of the year following its appointment.

(9) The formula advisory committee shall make its recommendations to the Commissioner no later than the February 1 of the year following its appointment.

(b) Health-Related Institution Formula Recommendation.

(1) At the quarterly meeting of the Coordinating Board in April of even-number years, the Commissioner shall recommend a funding formula for the next biennium for health-related institutions. The Commissioner shall also report the recommendations of the formula advisory committee.

(2) In making recommendations, the Commissioner shall consider the financial needs of affected institutions, funding provided for equivalent courses in general academic institutions, funding levels at peer institutions in other states, and other factors as appropriate.

(3) The Commissioner shall recommend an all funds appropriation.

(4) After adoption, the Commissioner shall transmit the Board's recommendations to the Governor, the Legislature, and the Legislative Budget Board no later than June 1 of each even-numbered year.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402996

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



**19 TAC §13.25**

The Texas Higher Education Coordinating Board adopts new §13.25, concerning financial planning, with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1542-1547). Specifically, new §13.25 is adopted, concerning prohibiting public institutions of higher education from submitting for formula funding either semester credit hours or contact hours attempted by students who have enrolled in courses containing the same content for a third or more times at their institutions since Fall 2002.

The following comments were received regarding the amendments and new sections:

Comment: Regarding §13.25, Formula Funding Exceptions, Austin Community College recommended an exemption for community college students from the provision because "their academic background and age" made them more likely to take courses for a third time.

Response: Upon reviewing the intent of the language in the appropriations bill that authorized prohibiting formula funding for third-time enrollments in the same course, the Board concluded that all students at public higher education institutions were to be included under this provision. No changes were made as a result of this comment.

Comment: Regarding §13.25, Formula Funding Exceptions, North Harris Montgomery Community College District asked for clarification as to whether community college districts were affected by subsection (a).

Response: The Board agrees that a clarifying statement specifically including community college districts should be included in §13.25(a) and this section has been changed as a result of this comment.

Comment: Also regarding §13.25(a), Dallas County Community College District and Collin County Community College District requested the Board consider changing the effective date of the section to Summer I, 2004, rather than Spring 2004, to coincide with the base period, and to change the tracking period for enrolled students from Fall 2002 to Fall 2003, when the provision in the appropriations bill became effective, to give institutions more time to implement tracking systems on their campuses.

Response: Upon reviewing the intent of the language in the appropriations bill that authorized prohibiting formula funding for third-time enrollments in the same course, the Board concluded that no savings would be realized if the effective date were changed to Summer 1, 2004 and the tracking period changed to Fall 2003. No changes were made as a result of this comment.

Comment: Regarding §13.25(d)(3) and (4), The University of Texas at Austin requested clarification of the list of exemptions pertaining to independent study courses, special topics courses, and seminars.

Response: The Board agrees that clarification to §13.25(d)(3) and (4) was needed and changes were made as a result of this comment to include all independent study courses and special topics and seminar courses as exempt from the requirements of §13.25.

Comment: One commenter requested that the Board add a provision in §13.25(d), which would describe how the 18-hour and 27-hour limits on formula funding for developmental educational courses would be effected by the limits on formula funding implemented in this section.

Response: In response to this comment, changes were made to §13.25, adding §13.25(d)(6) to permit formula funding for students who enroll in developmental education courses designed as individualized instruction more than twice.

Comment: Dallas County Community College District recommended expanding the list of courses that may be exempt from the provisions of §13.25(d).

Response: The commenter did not suggest specific courses that should be exempt from the provisions of §13.25 and the courses that are included in this section are examples only. The Board will consider amendments to this section in the future if it is necessary to include additional courses. No changes were made as a result of this comment.

Comment: Austin Community College, Collin County Community College District, Dallas Community College District, and the Texas Association of Community College Business Officers also submitted comments regarding the community colleges' ability to charge additional fees when enrolled students take courses for the third time that cannot be counted for formula funding.

Response: The Board does not have the authority to permit an institution to charge additional fees and the legislation is silent on this issue. No changes were made as a result of this comment.

The new §13.25 is adopted under the Texas Education Code, §§61.059, 51.307, 51.3062, and 61.027, which gives the Coordinating Board the authority to devise, establish and periodically review and revise formulas for the use of the Governor and the

Legislative Budget Board in making appropriations recommendations to the Legislature, to adopt necessary rules, and to implement the provisions of the Texas Success Initiative.

#### *§13.25. Formula Funding Exceptions.*

(a) During each base year and non-base year, an institution or community college district shall not submit for formula funding any semester credit hours or contact hours attempted by a student who has enrolled in any course, other than a non-degree-credit developmental course, containing the same content for a third or more times at their institutions since Fall Semester 2002. This provision is effective for the Spring 2004 semester for credit students and for Third Quarter 2004 for continuing education students.

(b) During each base year and non-base year, an institution shall not submit for formula funding any semester credit hours attempted by a student who has enrolled in development coursework, if the semester credit hours for that student in development coursework exceeds 18 semester credit hours, for a general academic teaching institution, or 27 semester credit hours for a public junior college, public technical institute, or public state college.

(c) English as a Second Language (ESL) hours may be used for developmental education purposes when a student is placed in such courses as a result of failing the reading or writing portion of a test required by the Texas Success Initiative. However, when used for such purposes, ESL hours shall be counted toward the 18/27 hour cap.

(d) Semester credit hours or contact hours attempted by students for the following types of coursework are exempt from the provisions of this section:

- (1) thesis and dissertation courses.
- (2) courses that may be repeated for credit because they involve different or more advanced content each time they are taken, including but not limited to, individual music lessons, Workforce Education Course Manual Special Topics courses (when the topic changes), theater practicum, music performance, ensembles, certain physical education and kinesiology courses, and studio art.
- (3) independent study courses.
- (4) special topics and seminar courses.
- (5) Continuing education courses that must be repeated to retain professional certification.
- (6) Developmental Education coursework taken for a third or more times may be submitted for formula funding if the coursework is within the 27-hour limit at two-year colleges and the 18-hour limit at general academic institutions specified in subsection (b) of this Section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402997

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER C. BUDGETS



## 19 TAC §§13.43, 13.45 - 13.47

The Texas Higher Education Coordinating Board adopts amendments to §§13.43 and 13.45 - 13.47 of Board rules, concerning financial planning, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1542-1547). Specifically, §13.43 is amended to clarify the distribution list of the annual budgets and to change the due date to December 1 of each fiscal year. Section 13.45 is amended, to add the requirement that budgets be prepared within the limits of revenue available and §§13.46 and 13.47 are amended, to provide more easily understood titles for the sections.

No comments were received regarding these amendments.

The amendments are adopted under the Texas Education Code, §§61.059, 51.307, 51.3062, and 61.027, which gives the Coordinating Board the authority to devise, establish and periodically review and revise formulas for the use of the Governor and the Legislative Budget Board in making appropriations recommendations to the Legislature, and to adopt necessary rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402998

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER D. FINANCIAL REPORTING

### 19 TAC §13.63, §13.64

The Texas Higher Education Coordinating Board adopts new §§13.63 and 13.64 of Board rules, concerning financial planning, with changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1542-1547). Specifically, new §13.63 is adopted, concerning additional financial information reporting and new §13.64 is adopted, concerning Available University Fund Reporting.

The following comments were received regarding the amendments and new sections:

Comment: Regarding §13.63(a), The University of Texas System recommended clarifying language on the required format for financial data reporting. The language would help demonstrate that the Board-required annual financial report by fund group is a different report from one with a similar name that is required by the Office of the Comptroller.

Response: The Board agrees with this comment and §13.63(a) was changed to clarify.

Comment: Regarding §13.63(b), the Board's Public Community College Annual Financial Reporting Committee recommended clarifying language so that the expense and revenue categories of the Annual Financial Report would more closely match those in the Report of Fundable Operating Expenses.

Response: The Board agrees with this comment and changes were made to include new subsection (b) to provide clarity. As a result of this new subsection, it was no longer necessary to include the community colleges in subsection (a), and the word "community" was struck from the earlier proposed language in subsection (a).

Comment: Regarding §13.64(a)(1)(C), The University of Texas System recommended clarifying language on the use of excellence funds allocation report to include reporting by component.

Response: The Board agrees with this comment and §13.64(a)(1)(C) was changed to provide clarity.

New §§13.63 and 13.64 of Board rules are adopted under the Texas Education Code, §§61.059, 51.307, 51.3062, and 61.027, which gives the Coordinating Board the authority to devise, establish and periodically review and revise formulas for the use of the Governor and the Legislative Budget Board in making appropriations recommendations to the Legislature, and to adopt necessary rules.

#### §13.63. Additional Financial Information Reporting.

(a) Each university system, general academic institution, technical or state college, and health-related institution shall provide to the Board financial data related to the operation of each system office and institution. This information should be reported in the Board's annual report of financial activity by fund group.

(b) Each community college shall continue to provide to the Board financial data related to the operation of each community/junior college reflecting restricted and non-restricted operating revenues and operating expenses as directed by the Board.

(c) Each system office and institution of higher education shall provide the report no later than January 1 of each year using the specific content and format prescribed by the Board.

#### §13.64. Available University Fund (AUF) Reporting.

(a) The University of Texas System Board of Regents and the Texas A & M University System Board of Regents shall report the uses of the Available University Fund (AUF) for each system component and for system office operations for the two previous years, the current year, and two future years (projected), including:

- (1) Debt service allocations, by component,
- (2) Bond proceeds allocations, by component,
- (3) Excellence allocations (by component), or system office, and their purposes,
- (4) Available University Fund income, interest, beginning- and end-of-year balances; and
- (5) The rationale used by the respective boards to distribute AUF funds.

(b) In addition, by December 1 of each year, authorized managers of permanent funds and endowments whose earnings are appropriated in the General Appropriation Act shall submit an annual financial report that shall include, at a minimum, an income statement and balance sheet and a summary of the investment return of the fund during the preceding fiscal year. The annual financial report shall also contain:

- (1) A summary of all gains, losses, and income from investments and an itemized list of all securities held for the fund on August 31;

(2) Any other information necessary to indicate clearly the nature and extent of investments made of the fund and all income realized from the components of the fund.

(c) The annual financial report shall be distributed to the Governor, the Legislature, the Legislative Budget Board, and the Board by December 1 of each year.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402999

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## SUBCHAPTER K. TECHNOLOGY WORKFORCE DEVELOPMENT GRANT PROGRAM

### 19 TAC §§13.190, 13.193 - 13.195

The Texas Higher Education Coordinating Board adopts amendments to §§13.190 and 13.193 - 13.195 of Board rules, concerning financial planning, without changes to the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1542-1547). Specifically, §13.190 is amended to correct statutory citation. Sections 13.193 and 13.194 are amended to allow for the establishment and dissemination of project funding recommendations prior to review panel meetings and §13.195 is amended to allow longer term grants.

There were no comments received regarding the amendments.

These amendments are adopted under Texas Education Code, §§51.851 through 51.860, which providing the Board with the authority to administer and adopt rules for the Technology Workforce Development Grant Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200403000

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## CHAPTER 25. OPTIONAL RETIREMENT PROGRAM

## SUBCHAPTER A. OPTIONAL RETIREMENT PROGRAM

### 19 TAC §§25.1 - 25.3

The Texas Higher Education Coordinating Board adopts the repeal of §§25.1 - 25.3 concerning Optional Retirement Program, without changes to the proposal as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1548). Specifically, this repeal will delete the current Subchapter A and all sections within it regarding Optional Retirement Program. The repeal is the result of the Board's review of Chapter 25, which was posted in the Texas Register on September 19, 2003. Amendments are being adopted to Chapter 25 concerning ORP eligibility, uniformity policies, recent legislative changes, and improvement of clarity and consistency. These amendments require the addition of several sections and a re-organization of the existing rules. For that reason, the Board adopts the repeal of Chapter 25, in its entirety, and separately adopts new chapters and sections.

No comments were received regarding the proposed repeal.

The repeal of the sections is adopted under the Texas Government Code, §§830.001 - 830.205.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402992

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



### 19 TAC §§25.1 - 25.6

The Texas Higher Education Coordinating Board adopts new §§25.1 - 25.6, concerning Optional Retirement Program, with changes to §25.3(11), §25.3(13), §25.4(g)(3), §25.6(a)(3)(A), §25.6(a)(7), §25.6(b), §25.6(c)(5)(B), §25.6(c)(6), and §25.6(f)(3) of the proposed text as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1548). Sections 25.1, 25.2 and 25.5 are being adopted without changes and will not be re-published. Specifically, these new rules replace existing rules being repealed contemporaneously in this issue of the *Texas Register* for the purpose of re-organization and the addition of sections that incorporate legislative changes, provisions concerning uniformity in institutional administration of ORP, and provisions to improve clarity and consistency.

The following comments were received regarding the new sections:

Comment: Texas Tech University staff recommended adding "insurance" between "applicable" and "eligibility requirements" in the definition of ORP retiree in §25.3(13) to clarify that the requirements are not ORP requirements.

Response: We agree with the comment and §25.3(13) has been changed to add "retiree insurance."

Comment: The Texas Association of Insurance and Financial Advisors (TAIFA) commented on §§25.6(a)(3)(C) and 25.6(c)(7)(A) and (B), relating to a requirement that ORP contributions may only be made to an ORP contract that is authorized by the participant's current employing institution, including companies that the institution has "grandfathered" or otherwise authorized on an individual basis after confirming that the contract is a valid ORP contract. TAIFA expressed concern that ORP participants should be able to contribute to any Texas ORP account, including accounts from prior employment with a different institution, provided the statutory distribution restrictions are in place, because preventing a participant from contributing to an existing account could take away the advantage of break points available in mutual funds and some of the favorable provisions in older annuity contracts such as higher fixed interest rates and expired surrender charges. Security Benefit Life Insurance Companies (Security Benefit) also commented on these sections, expressing concern that employees should be allowed to transfer ORP accounts between institutions and to move funds in a grandfathered account into an active account, which would allow participants to stay abreast of the constantly changing products.

Response: We agree with TAIFA that ORP contributions should only be sent to valid ORP contracts that contain the statutory distribution restrictions, and these Chapter 25 provisions require institutions to confirm that the restrictions are in place before authorizing ORP contributions to be sent to those contracts. The ORP statute provides that the institutions shall establish the ORP contracts for their employees, so it is the institutions' responsibility to ensure that ORP contributions are only sent to valid ORP contracts. However, these provisions do not require institutions to send ORP contributions to any particular company, including a company that a new employee has an account with from a prior period of employment with another institution, as recommended in the comments. This position is based on two Attorney General's Opinions--JM-691 (1987) and DM-271 (1993)--that provide that the institutions are authorized to control the selection of ORP companies that do business with their employees. These Chapter 25 provisions do allow institutions to authorize contributions to companies that are not on their established list of authorized companies if they have verified that the ORP distribution restrictions are in place. These provisions do allow the types of transfers that Security Benefit referred to, as long as the current employing institution has verified that the receiving account is a valid ORP contract. No changes were made as a result of this comment.

Comment: TAIFA expressed concern about §25.6(c)(3)(A), relating to a requirement that each institution must authorize at least four ORP companies, including at least one company that offers 403(b)(1) annuity accounts and one company that offers 403(b)(7) custodial accounts. TAIFA recommended that each institution should provide 12 to 16 different choices of companies because if only four companies are allowed and four types of products are available (fixed annuity, variable annuity, no-load mutual fund and load mutual fund), a participant could only have one choice for their selected type of investment, which would be problematic for participants with large account balances who don't want to have all their funds invested with one company because of concerns about recent mutual fund investigations and company solvency. Security Benefit requested consideration for increasing the minimum number of companies authorized by the institutions, especially with respect to 403(b)(1) annuity accounts

and 403(b)(7) custodial accounts, because one company providing these services may not provide adequate options to the employees, especially when the market is volatile and companies continue to experience market conduct issues.

Response: We agree that diversification is an important tool for prudent investing. However, this provision, which dates back to the early years of the program, provides for a minimum, not a maximum, of four companies, so institutions are free to authorize as many qualified companies as they choose to, as provided in subparagraph (C) of that same provision ("No Maximum Number"). Subparagraph (B) of that same provision ("Variety of Choices") also addresses this concern by requiring employers to provide a reasonable variety of choices among types of accounts and funds. Currently, all institutions provide a selection of at least eight companies, many institutions have between 10 and 20 authorized companies, and some have authorized in excess of 20 companies. Most, if not all, institutions have "grandfathering" policies that allow participants to continue sending ORP contributions to a company if it is removed from the institution's list of authorized companies (for example, because of low participation, which is a client-driven provision). The actual number of companies currently receiving ORP contributions across the state is in excess of 100. Furthermore, offering one to four companies is common among comparable ORP-type plans administered by university systems in states outside of Texas, so establishing a minimum of four companies for Texas ORP would not be inconsistent with other such plans. Staff monitors activity in this area through the annual ORP participation reports submitted by the institutions and will be able to respond if problems arise. No changes were made as a result of this comment.

Comment: TAIFA commented on §25.6(c)(5)(B), which allows institutions to scrutinize the quality of ORP products and select ORP companies and products through a competitive bid process. TAIFA recommended that competitive bids should be used cautiously, with all factors considered, not just cost, because if only cost is considered, they are concerned that the option of financial advisors would be taken away. Security Benefit expressed concern about the term "competitive bid process" in this provision and recommended additional wording to clarify that the intent of this regulation is not to eliminate options or services to employees, because unless clearly stated, the competitive bidding process often focuses on product pricing and fees. The University of Texas System Office commented that selection of ORP vendors through a "competitive bid process" is problematic for the U.T. System given the request from the Legislature in the past that a minimum criteria methodology be utilized to select vendors.

Response: The language in this provision, which was taken directly from Attorney General's Opinion DM-271 (1993), includes "quality" as part of the process, so this provision was not intended to imply that cost should be the only factor or that a low-bid process is required. We agree that the wording should be clarified to promote understanding of the intent, so §25.6(c)(5)(B) was changed to replace the term "competitive bid process" with "competitive selection process," add "minimum criteria process" as an option, and include examples of the types of criteria that institutions may utilize that are related to performance and services rather than specifically to cost.

Comment: TAIFA commented on §§25.6(c)(15)(B) and (C), which allow institutions to participate in the designation of authorized company representatives who contact their employees, including restricting the number of designated representatives.

TAIFA is concerned that the participant, not the employer, should select the representative with whom they will be working, provided the representative is certified by the company, sufficiently trained, and knowledgeable about ORP, because the relationship with the representative is often more important than the company.

Response: The primary purpose of paragraph (15) is to help ensure that ORP participants are not provided incorrect or misleading information about ORP provisions by company representatives. Because the ORP statute provides that the institutions shall establish the contractual relationships, we believe that the institutions should also have the authority to participate in the designation of the representatives of those companies who will be contacting their employees about ORP. This provision allows institutions and companies to jointly designate the authorized representatives for the purpose of certifying that they are sufficiently trained and knowledgeable about ORP provisions as well as essential local institutional ORP policies and procedures. Employees are free to choose from among the designated representatives. No changes were made as a result of this comment.

Comment: TAIFA expressed concern that an area not addressed in the proposed rules is lump sum transfers between companies and recommended that participants should have complete control in selecting which companies have their accounts, provided the accounts are Texas ORP and have the proper distributions restrictions.

Response: We agree that ORP participants should be able to make lump sum transfers between ORP companies, and changes were made to §25.6(c)(6)(E) to clarify that these transfers are allowed; however, to ensure that the funds are only being transferred to an ORP contract that contains the distribution restrictions, the employing institution must confirm that the contract is a valid ORP contract before allowing a transfer for the same reasons as stated in the response to the earlier comment concerning §§25.6(a)(3)(C) and 25.6(c)(7)(A) and (B).

Comment: The University of Texas System Office commented that the proportionality provision in §25.6(a)(7) fails to specify that the provision does not apply to supplemental employer contributions that institutions may choose to make under the amendments to the ORP statute made by HB 264 (78th), which are covered in §25.6(a)(6)(C).

Response: We agree and changes were made to §25.6(a)(7) in response to the comments.

Comment: The Texas A&M University System Office staff expressed concern that §25.6(b) provides that employee contributions refunded by TRS to an ORP participant in conjunction with an election of ORP may be rolled over to the participant's ORP account. Passage of the federal EGTRAA legislation in 2001 allowed rollovers from TRS-type accounts to ORP-type accounts, but a question was raised concerning use of the term "rollover" for an in-service transaction.

Response: We agree that additional clarification is needed. After consultation with the TRS legal department, changes were made to §25.6(b) and references to it in §§25.4(g)(3) and §25.6(a)(3)(A) to add the term "transfer" and to indicate that applicable IRS provisions regarding these types of transactions must be followed. Additional clarifying language has been added to provide a better description of the type of contributions that are affected by this provision (i.e., employee contributions made to TRS after an ORP-eligible employee becomes eligible

to elect ORP but prior to an election of ORP, which may occur because ORP-eligible employees may elect ORP up to 90 days after becoming eligible to elect ORP and membership in TRS is required until the election of ORP is made).

Comment: The University of Texas System Office requested that §25.6(f)(3), which concerns prohibited distributions by an ORP company (e.g., pre-termination loans that are not allowed under the ORP statute), should indicate that a prohibited distribution is not related to ORP but is actually a separate transaction between the ORP company and the employee, such as an unsecured loan that the company has made to the participant.

Response: We agree and §25.6(f)(3) was changed as a result of this comment.

Comment: The University of Texas System Office commented that §25.4(g)(2)(B) does not address the situation in which a new ORP-eligible employee's 91st day of employment falls after payroll is run for the period. They recommended that institutions be allowed to require that those employees must submit their paperwork before payroll is run for that month in order to have ORP for that month. Those employees who fail to submit ORP election paperwork prior to payroll cutoff would be placed in the Teacher Retirement System (TRS) for that month and ORP would begin for the following month.

Response: Subsection 25.4(g) establishes that an employee's ORP participation start date will depend on when the employee makes an election of ORP by submitting the ORP election forms. Paragraph (1) addresses employees who submit their ORP election forms on or before their initial ORP eligibility date, which is the 91st day of employment for new employees who are subject to the 90-day TRS waiting period. Paragraph (2) addresses employees who submit their ORP election forms after their initial ORP eligibility date. Subparagraph 25.4(g)(2)(B), which is cited in the comment, does not address the situation described in the comment because it addresses only the situation where an employee submits the ORP election forms after the month in which the 91st day of employment (i.e., initial ORP eligibility date) falls. The situation described in the comment is addressed by §25.4(g)(1)(B) or §25.4(g)(2)(A), depending on whether the forms are submitted by the initial ORP eligibility date, or after that date but before payroll is run for the month in which the ORP eligibility date falls. UT System's recommendation would be a change to §25.4(g)(1)(B), which provides that the participation start date for employees who submit their ORP election forms on or before their initial ORP eligibility date shall be the first of the month in which the initial ORP eligibility date falls, regardless of whether the forms are submitted before payroll is run for that month. This provision is based on the long-standing ORP policy that an ORP-eligible employee who makes an election of ORP in lieu of TRS by signing and submitting the ORP election forms on or before the initial ORP eligibility date will become an ORP participant as of the initial ORP eligibility date and, therefore, will not be required to become a contributing member of TRS for that month. Immediate participation in ORP rather than contributing to TRS for the month in which the initial ORP eligibility date falls has two advantages for the employee. First, because vesting in ORP is based on actual participation, an employee who makes an election on or before the initial ORP eligibility date will be able to vest one month sooner. Second, state contributions that are sent to TRS while an employee is a contributing member cannot be recovered when the election of ORP is made because only employee contributions may be withdrawn upon termination of active membership--the state contribution remains in the TRS

fund--so an election of ORP on or before the initial ORP eligibility date provides the employee with the full state contribution (and supplemental employer contribution for ORP, if any) for that month. Institutions may encourage ORP-eligible employees who wish to elect ORP to submit their election forms before payroll is run for the month in which their initial ORP eligibility date falls; however, it is not appropriate for an institution to force employees whose initial ORP eligibility date falls after that institution runs payroll to contribute to TRS for that month if they have actually submitted their paperwork on or before their initial ORP eligibility date. No changes were made as a result of this comment.

The new sections are adopted under the Texas Government Code, §§830.001-830.205, which give the Coordinating Board the authority to adopt rules concerning the Optional Retirement Program.

#### §25.3. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) **Active Participation**--Period of employment during which an ORP participant makes regular ORP contributions through payroll deduction based on the statutory percentage of the employee's salary earned during that period, which along with the matching employer contributions, are sent by the ORP employer to an authorized ORP company. A faculty member who is not employed by a Texas public institution of higher education during the three summer months but who was participating in ORP at the end of the spring semester immediately preceding the summer and who resumes ORP participation with the same or another Texas public institution of higher education in the fall semester immediately following that summer shall be considered an active participant during the three summer months.

(2) **Applicable Retirement System**--The Teacher Retirement System of Texas for employees of Texas public institutions of higher education and the Employees Retirement System of Texas for employees of the Board.

(3) **Board**--The Texas Higher Education Coordinating Board.

(4) **Break in Service**--A period following a participant's termination of all employment with all Texas public institutions of higher education or the Board that is at least one full calendar month in which no ORP contribution is made, excluding the three summer months for faculty members who were participating in ORP at the end of the spring semester immediately preceding the summer and who resume ORP participation with the same or another Texas public institution of higher education in the fall semester immediately following that summer, and excluding periods of leave-without-pay. A transfer between Texas public institutions of higher education with less than a full calendar month in which no ORP contribution is made shall not be considered a break in service.

(5) **ERS**--The Employees Retirement System of Texas.

(6) **Full-time**--For purposes of determining initial ORP eligibility, the term "full-time" shall mean employment for the standard full-time workload established by the institution ("100 percent effort") at a rate comparable to the rate of compensation for other persons in similar positions for a definite period of four and one-half months or a full semester of more than four calendar months.

(7) **Initial ORP Eligibility Date**--The first day of an ORP-eligible employee's 90-day ORP election period. An employee's initial ORP eligibility date shall be determined as follows:

(A) **Non-Members**. For a new employee of a Texas public institution of higher education who has never been a member of TRS (or a new employee of the Board who has never been a member of ERS), or who is a former member of the applicable retirement system who canceled membership by withdrawing employee contributions from the retirement system after termination from a prior period of employment, the initial ORP eligibility date shall be the 91st calendar day of employment in a TRS-eligible position (or, for employees of the Board, an ERS-eligible position) that is also an ORP-eligible position.

(B) **Current Members**. For an employee who is a current member of TRS (or, for employees of the Board, a current member of ERS) at the time that he or she becomes employed in an ORP-eligible position, the initial ORP eligibility date shall be the first day of employment in an ORP-eligible position.

(8) **Initial ORP Eligibility Period**--The period of time beginning with the first date of employment in an ORP-eligible position, without regard to a person's 90-day waiting period for membership in TRS or ERS, if applicable, that is expected to be 100 percent effort for a period of at least one full semester or four and one-half months.

(9) **Major Department Requirement**--One of the factors used to determine whether a position is ORP-eligible in the "Other Key Administrator" category as defined in §25.4(k) of this title (relating to Eligible Positions). A department or budget entity at a public institution of higher education shall meet this requirement if:

(A) the department or budget entity is considered a "major" department by the institution based on the specific organizational size and structure of that institution; and

(B) the department or budget entity has its own budget, policies and programs.

(10) **ORP**--The Optional Retirement Program.

(11) **ORP Election Period**--The period of time during which ORP-eligible employees have a once-per-lifetime opportunity to elect to participate in ORP in lieu of the applicable retirement system. The ORP election period shall begin on an employee's initial ORP eligibility date, as defined in paragraph (7) of this section, and shall end on the earlier of:

(A) the date the employee makes an ORP election by signing and submitting the appropriate forms to the ORP employer; or

(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first working day after the 90th calendar day.

(12) **ORP Employer**--All public institutions of higher education in Texas and the Board.

(13) **ORP Retiree**--An individual who participated in ORP while employed with a Texas public institution of higher education or the Board and who established retiree status by meeting the applicable retiree insurance requirements and enrolling in retiree group insurance provided by ERS, The University of Texas System, or The Texas A&M University System, regardless of whether currently enrolled.

(14) **Principal Activity Requirement**--One of the factors used to determine whether a position is ORP-eligible based on the percent of effort required by the position to be devoted to ORP-eligible duties. The principal activity requirement shall be met if at least 51 percent of the position's duties are devoted to ORP-eligible duties in

one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), with two exceptions:

(A) During Initial ORP Eligibility Period. During an employee's initial ORP eligibility period (when the position is required to be 100 percent effort to qualify as ORP-eligible), if the ORP-eligible duties associated with an ORP-eligible category are less than 51 percent of the activities for a particular position, the position shall be considered to meet the principal activity requirement if all of the position's other duties are ORP-eligible duties under one of the other ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), for a total of 100 percent effort devoted to ORP-eligible duties, as would be the case, for example, for a position with required duties that are 50 percent instruction and/or research (faculty position) and 50 percent department chair (faculty administrator position).

(B) After Initial ORP Eligibility Period. For a participant who has completed the initial ORP eligibility period but who has not vested in ORP and who fills a position that is less than 100 percent effort but at least 50 percent effort, then the principal activity requirement shall be considered met if at least 50 percent effort is devoted to applicable ORP-eligible duties in one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions).

(15) TRS--The Teacher Retirement System of Texas.

(16) TRS/ERS Waiting Period--A period of 90 calendar days beginning with the first day of employment in a position that is otherwise eligible for membership in TRS or ERS. In accordance with state law, active membership in the applicable retirement system does not become effective until the 91st calendar day.

(A) The TRS/ERS waiting period does not apply to:

(i) new employees who are already members of the applicable retirement system based on contributions made during prior employment that have not been withdrawn; or

(ii) new employees who elected ORP in lieu of the applicable retirement system in a prior period of employment and who are eligible to resume ORP participation.

(B) As provided in §25.4(h) of this title (relating to Active Membership in Retirement System Requirement), a new employee who becomes employed in an ORP-eligible position and who is subject to the TRS/ERS waiting period is not permitted to elect ORP in lieu of the applicable retirement system until satisfying the TRS/ERS waiting period because the election of ORP is in lieu of active membership in the applicable retirement system.

(17) Vesting Requirement--The minimum amount of ORP participation required to attain vested status. An ORP participant shall be considered vested on the first day of the second year of active participation in lieu of the applicable retirement system, as provided in §25.5(a) of this title (relating to Vesting Requirement). A vested participant shall have ownership rights to the employer contributions in his or her ORP accounts, meaning that, upon termination of employment with all ORP employers or reaching age 70-1/2, he or she may access both the employee and employer contributions (and any net earnings) in his or her accounts. A vested participant shall remain in ORP even if subsequently employed in a position that is not ORP-eligible, as provided in §25.5(f) of this title (relating to Employment in a non-ORP-Eligible Position).

*§25.4. Eligibility to Elect ORP.*

(a) Eligibility Criteria. An employee shall be eligible to make a once-per-lifetime irrevocable election of ORP in lieu of the applicable retirement system if all of the following criteria are met:

(1) ORP-eligible Position: Employment in an ORP-eligible position as defined in subsection (k) of this section;

(2) 100 Percent Effort: Employment in an ORP-eligible position on a full-time basis (i.e., 100 percent effort) for a period of at least one full semester or four and one-half months, including the 90-day waiting period for active membership in the applicable retirement system, if applicable.

(A) Initial Eligibility Period. This eligibility requirement is an employee's initial ORP eligibility period, as defined in §25.3 of this title (relating to Definitions).

(B) Combining of Percent Effort at Different Institutions Not Permitted. The 100 percent effort requirement shall be satisfied by employment with only one institution, unless an individual is simultaneously employed in ORP-eligible positions with more than one component institution under the same governing board that operates its ORP either as a single plan for all components or includes the applicable components in the same plan, in which case, the employee's percent effort at each component may be combined to meet the minimum 100 percent effort requirement;

(3) First Election Opportunity: No previous opportunity to elect ORP in lieu of the applicable retirement system during the current or a prior period of employment at the same or another Texas public institution of higher education or the Board; and

(4) Active Membership in Retirement System: Current membership or eligibility for active membership in the applicable retirement system as provided in subsection (h) of this section.

(b) ORP Participation after Election. Once an employee makes an election of ORP, the employee's eligibility to continue participating in ORP shall be determined in accordance with §25.5 of this title (relating to ORP Vesting and Participation).

(c) Non-Texas ORP Plans. Prior enrollment, participation or vested status in any plan other than the ORP plan authorized under Texas Government Code, Chapter 830, shall have no bearing on an employee's eligibility to elect ORP, except that the employee must be eligible for active membership in the applicable retirement system as provided in subsection (h) of this section.

(d) Separate Elections. An election of ORP in lieu of TRS at a Texas public institution of higher education shall be considered separate and distinct from an election of ORP in lieu of ERS at the Board.

(1) An employee's prior election of ORP in lieu of ERS at the Board on or after September 1, 1994, shall have no bearing on that person's eligibility to elect ORP in lieu of TRS at a Texas public institution of higher education.

(2) An election of ORP by a Board employee prior to September 1, 1994, was made in lieu of TRS; therefore, an institution shall treat an employee's election of ORP in lieu of TRS at the Board prior to September 1, 1994, in the same manner as if the election had been made at an institution.

(3) An employee's prior election of ORP in lieu of TRS at an institution, or an employee's election of ORP in lieu of TRS at the Board prior to September 1, 1994, shall have no bearing on that person's eligibility to elect ORP in lieu of ERS at the Board.

(e) Opportunity to Elect. The governing board of each Texas public institution of higher education shall provide an opportunity to all eligible employees in the component institutions governed by the board to elect ORP in lieu of TRS in accordance with these rules. The

Board shall provide an opportunity to all eligible employees to elect ORP in lieu of ERS in accordance with these rules.

(f) 90-Day ORP Election Period. An employee who meets the eligibility criteria in section (a) of this section shall be provided an ORP election period, as defined in §25.3 of this title (relating to Definitions), during which an election to participate in ORP may be made by signing and submitting the appropriate forms to the ORP employer.

(1) After 90-Day TRS/ERS Waiting Period. The 90-day ORP election period shall follow the 90-day TRS/ERS membership waiting period for new employees, if applicable.

(2) Beginning and Ending Dates. The 90-day ORP election period shall begin on the employee's initial ORP eligibility date, as defined in §25.3 of this title (relating to Definitions), and shall end on the earlier of:

(A) the date the employee makes an ORP election by signing and submitting the appropriate forms to the ORP employer; or

(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first working day after the 90th calendar day.

(3) Once-per-Lifetime Irrevocable Election. An employee who is eligible to elect ORP shall have only one opportunity during his or her lifetime, including any future periods of employment in Texas public higher education, to elect ORP in lieu of the applicable retirement system, and the election may never be revoked.

(A) Default Election. Failure to elect ORP during the 90-day ORP election period shall be a default election to continue membership in the applicable retirement system.

(i) ORP in Lieu of TRS. An employee of a Texas public institution of higher education who does not elect ORP in lieu of TRS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of TRS, even if subsequently employed in an ORP-eligible position at the same or another Texas public institution of higher education.

(ii) ORP in Lieu of ERS. An employee of the Board who does not elect ORP in lieu of ERS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of ERS, even if subsequently employed in an ORP-eligible position at the Board.

(B) Irrevocable. An election of ORP shall be irrevocable. An employee who elects ORP shall remain in ORP, except as provided by subsections (f) and (g) of §25.5 of this title (relating to ORP Vesting and Participation). A default election of the applicable retirement system, as described in subparagraph (3)(A) of this subsection shall be irrevocable. An employee who fails to elect ORP during the ORP election period shall remain in the applicable retirement system in accordance with the laws and rules governing eligibility for the retirement system.

(C) Separate Elections. As provided in subsection (d) of this section, an election of ORP in lieu of TRS at a Texas public institution of higher education shall be considered separate and distinct from an election of ORP in lieu of ERS at the Board; therefore, an election of ORP in lieu of one retirement system shall not preclude an eligible employee's election of ORP in lieu of the other retirement system if subsequently employed in a position that is eligible to elect ORP in lieu of the other retirement system.

(4) Company Selection Required at Election. An employee who elects to participate in ORP shall select an ORP company from the

ORP employer's list of authorized companies in conjunction with the election of ORP. An ORP employer shall establish a policy that failure to select an authorized company may result in disciplinary action up to and including termination of employment because retirement contributions are required by law as a condition of employment.

(5) Waiver of Retirement System Benefits. An election of ORP shall be a waiver of the employee's rights to any benefits that may have accrued from prior membership in the applicable retirement system, other than benefits resulting from transfers of service credit between the applicable retirement systems and reinstatement of withdrawn service credit under the ERS/TRS service transfer law, even if the participant has met the applicable system's vesting requirement. Except as provided by subsections (f) and (g) of §25.5 of this title (relating to ORP Vesting and Participation) and the ERS/TRS service transfer law, an ORP participant shall not be eligible to become an active member of the applicable retirement system or receive any benefits from the system other than a return of employee contributions that may have been deposited with the system (and accrued interest, if any).

(g) Participation Start Date. The first day that ORP contributions are made shall be determined as follows.

(1) Election on Initial ORP Eligibility Date. The participation start date for ORP-eligible employees who elect ORP on their initial ORP eligibility date, as defined in §25.3 of this title (relating to Definitions), by signing and submitting the appropriate forms on or before their initial ORP eligibility date shall be based on whether they were subject to the 90-day TRS/ERS waiting period.

(A) If 90-Day TRS/ERS Waiting Period is not Applicable.

(i) New Employees. For new employees who are not subject to the 90-day TRS/ERS waiting period because they are already members of the applicable retirement system, and who sign and submit the appropriate ORP election forms on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment).

(ii) Transfers within Same ORP Employer. For employees who are not subject to the 90-day TRS/ERS waiting period because they are already members of the applicable retirement system, who transfer to an ORP-eligible position within the same ORP employer, and who sign and submit the appropriate ORP election forms on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment), unless the initial ORP eligibility date is not the first day of the month, in which case, to avoid dual contributions to both the applicable retirement system and ORP during the same month, as provided in §25.6(a)(4) of this title (relating to No Dual Contributions), the participation start date shall be the first day of the month following the month in which the initial ORP eligibility date falls, or the first day of the applicable payroll period, if payroll is not processed on a monthly basis.

(B) After 90-Day TRS/ERS Waiting Period. To avoid partial month contributions for employees who are subject to the 90-day TRS/ERS waiting period, the amount of the ORP contribution for the month in which their initial ORP eligibility date falls shall be based on salary earned during that entire month, so the participation start date shall be the first day of the month in which the initial ORP eligibility date falls, or the first day of the applicable payroll period, if payroll is not processed on a monthly basis.

(2) Election After Initial ORP Eligibility Date. The participation start date for ORP-eligible employees who sign and submit the appropriate ORP election forms after their initial ORP eligibility date,

shall be the first day of the month following the date that the forms are signed and submitted, with the following exceptions.

(A) During Month of Initial ORP Eligibility Date. ORP employers may establish a policy that employees who elect ORP by signing and submitting the appropriate forms after their initial ORP eligibility date but before the payroll has been processed for the month in which the initial ORP eligibility date falls may be treated in the same manner as the employees described in paragraph (1) of this subsection.

(B) After Month of Initial ORP Eligibility Date: ORP employers may establish a policy that employees who elect ORP by signing and submitting the appropriate forms after the month in which their initial ORP eligibility date falls, but before the payroll has been processed for the month in which the forms are signed and submitted, may start participating in the month in which the forms are signed and submitted rather than the first of the following month. To avoid partial month payments, contributions for these participants shall be based on salary earned during the entire month in which the forms are signed and submitted, or during the entire pay period in which the forms are signed and submitted, if payroll is not processed on a monthly basis.

(3) Retirement System Membership Before Election. As provided in subsection (i) of this section, ORP-eligible employees who elect ORP after their initial ORP eligibility date, except as provided in subparagraph (2)(A) of this subsection, shall be reported as members of the applicable retirement system for any months prior to their election of ORP. As provided in §25.6(b) of this title (relating to Withdrawal of Retirement System Funds), employee contributions that are made to the applicable retirement system after an employee becomes eligible to elect ORP but prior to an election of ORP, including the month in which the ORP election is made, if applicable, may be withdrawn from the retirement system after an election of ORP is made, and may be rolled over or transferred to the participant's ORP account, in accordance with IRS provisions regarding this type of transaction.

(h) Active Membership in Retirement System Requirement. Participation in ORP shall be an alternative to active membership in the applicable retirement system; therefore, a person who becomes employed in an ORP-eligible position shall not be eligible to elect ORP unless he or she is either a current member of the applicable retirement system (i.e., has employee contributions on account with the applicable retirement system) or has satisfied the 90-day waiting period for active membership in the applicable retirement system.

(1) 90-Day TRS/ERS Waiting Period. Employees who are not current members of TRS when they become employed in an ORP-eligible position at a Texas public institution of higher education shall not be eligible to elect ORP in lieu of TRS until the 90-day TRS waiting period has been satisfied. Employees who are not current members of ERS when they become employed in an ORP-eligible position at the Board shall not be eligible to elect ORP in lieu of ERS until the 90-day ERS waiting period has been satisfied.

(2) Retirees Not Eligible. Employees who have retired from TRS or ERS are no longer active members of the applicable retirement system; therefore, a TRS retiree shall not be eligible to elect ORP in lieu of TRS at a Texas public institution of higher education and an ERS retiree shall not be eligible to elect ORP in lieu of ERS at the Board.

(i) Automatic Retirement System Enrollment. A new employee at a Texas public institution of higher education who is eligible to elect ORP in lieu of TRS shall be automatically enrolled in TRS, following the 90-day TRS waiting period, if applicable, until an election to participate in ORP is made by signing and submitting the appropriate forms to the institution as provided in subsection (g) of this section. A new Board employee who is eligible to elect ORP in lieu

of ERS shall be automatically enrolled in ERS, following the 90-day ERS waiting period, if applicable, until an election to participate in ORP is made by signing and submitting the appropriate forms to the Board as provided in subsection (g) of this section.

(j) Dual Employment in TRS/ORP Positions at Different Employers.

(1) Simultaneous Retirement Plan Membership Not Permitted.

(A) Dual Employment with ORP Employer and non-ORP Employer. A member of TRS who is employed in the Texas public school system (including all Texas Independent School Districts and regional educational service centers) or with any other Texas public educational institution or state agency that is covered by TRS but does not offer ORP in lieu of TRS, and who concurrently becomes employed in an ORP-eligible position with a Texas public institution of higher education and elects to participate in ORP, may not remain an active member of TRS as an employee of the non-ORP employer once ORP participation has started. TRS contributions may not be made for the participant's employment with the non-ORP employer while he or she is actively participating in ORP.

(B) Dual Employment with Different ORP Employers. A member of TRS who is employed with a Texas public institution of higher education in a position that is eligible for TRS but is not ORP-eligible and who becomes concurrently employed with another Texas public institution of higher education in a position that is ORP-eligible and who elects to participate in ORP, may not remain an active member of TRS once ORP participation has started. TRS contributions may not be made for the participant's employment in the TRS-only position at the other Texas public institution of higher education while he or she is actively participating in ORP. Once the participant vests in ORP, ORP contributions shall be made based on the concurrent employment in the TRS-only position.

(2) Returning to TRS.

(A) If the individual described in subparagraph (1)(A) of this subsection terminates ORP participation while concurrently employed in a TRS-eligible position with a non-ORP employer, then he or she shall return to active TRS membership with the non-ORP employer and shall be ineligible for any future ORP participation in lieu of TRS.

(B) If the individual described in subparagraph (1)(B) of this subsection terminates ORP participation prior to vesting in ORP while concurrently employed in a TRS-eligible position with another Texas public institution of higher education, then he or she shall return to active TRS membership and shall be ineligible for any future ORP participation in lieu of TRS.

(C) If the individual described in subparagraph (1)(B) of this subsection terminates ORP participation after satisfying the ORP vesting requirement, but while concurrently employed in a TRS-eligible position with another Texas public institution of higher education, then he or she shall not return to TRS membership and shall continue to make ORP contributions based on the employment in the TRS-only position.

(k) Eligible Positions. The following positions shall be considered ORP-eligible. Only those employees who fill ORP-eligible positions and who meet the eligibility requirements established in this chapter shall be eligible to elect ORP or to continue participating in ORP prior to vesting.

(1) Faculty Member--A member of the faculty whose duties include teaching and/or research as a principal activity, as defined in §25.3 of this title (relating to Definitions), and who holds the title of



professor, associate professor, assistant professor, instructor, lecturer, or equivalent faculty title, including "visiting professor" if the position is at least one full semester in duration.

(2) Faculty Administrator--An administrator responsible for teaching and research faculty whose principal activity, as defined in §25.3 of this title (relating to Definitions), is planning, organizing, and directing the activities of faculty and who holds the title of dean, associate dean, assistant dean, director, department chair, or head of academic department.

(3) Executive Administrator--An administrator who holds the title of chancellor, deputy chancellor, vice chancellor, associate vice chancellor, assistant vice chancellor, or the equivalent, and an administrator who holds the title of president, executive vice president, provost, vice president, associate vice president, assistant vice president, or the equivalent.

(4) Other Key Administrator--An administrator other than a faculty administrator or an executive administrator whose position is considered a key administrative position within the institution's organizational structure and that meets the requirements of this paragraph. The most common position titles in this category are director or associate director, but included titles may vary by institution based on differences in organizational structure, size, mission, etc. All positions in this category, including positions with the title of director or associate director, shall meet the following criteria:

(A) serves as director or other administrative head of a major department or budget entity, as defined in §25.3 of this title (relating to Definitions), excluding the title of assistant director unless the assistant director position has responsibility for what is considered a major department or budget entity that is within a larger department or budget entity, as may be the case at large institutions;

(B) is responsible for the preparation and administration of the budget, policies, and programs of the major department or budget entity;

(C) usually reports to the office of a chancellor, president, vice chancellor, vice president, dean, or equivalent; and

(D) is generally and customarily recruited from the same pool of candidates that other colleges and universities across the nation are recruiting from for this type of position by, for example, advertising in national publications such as the Chronicle of Higher Education or in newsletters or websites of national professional associations or at meetings of such associations.

(E) A position shall not be considered ORP-eligible under this category unless it can be reasonably demonstrated that all of the applicable criteria have been met. If there is significant ambiguity concerning whether a position meets the criteria for this category, the default finding shall be that the position is not ORP-eligible.

(5) Librarian--A professional librarian who holds, at a minimum, a master's degree in library science or information science, and whose principal activity, as defined in §25.3 of this title (relating to Definitions), is library services.

(6) Athletic Coach--An athletic coach, associate athletic coach, or assistant athletic coach whose principal activity, as defined in §25.3 of this title (relating to Definitions), is coaching, excluding an athletic trainer, and excluding an athletic director or assistant athletic director unless the principal activity is coaching rather than administrative.

(A) Athletic trainers may be included in the "professional" category if the position requires the trainer to be a physician.

(B) Athletic directors whose principal activity is not coaching normally shall be included in one of the administrator categories.

(7) Professional--An employee whose principal activity, as defined in §25.3 of this title (relating to Definitions), is performing the duties of a professional career position, including, but not necessarily limited to, physician, attorney, engineer, and architect, that meets the following criteria:

(A) requires a terminal professional degree in a recognized professional career field that requires occupation-specific knowledge and appropriate professional licensure;

(B) is a non-classified position; and

(C) is generally and customarily recruited from the same pool of candidates that other colleges and universities across the nation are recruiting from for this type of position by, for example, advertising in national publications such as the Chronicle of Higher Education or in newsletters of national professional associations or at meetings of such associations.

(D) A position shall not be considered ORP-eligible under this category unless it can be reasonably demonstrated that all of the applicable criteria have been met. If there is significant ambiguity concerning whether a position meets the criteria for this category, the default finding shall be that the position is not ORP-eligible.

(8) Board Administrative Staff--A member of the executive or professional staff of the Board, as determined by the Commissioner of Higher Education, who fills a position with the following requirements:

(A) college graduation and prior experience in higher education or experience of such kind and amounts to provide a comparable background; and

(B) national mobility requirements similar to those of faculty.

(l) Position-Required Qualifications. An employee who meets the qualifications of a "professional" or a "librarian" as defined in subsection (k) of this section shall not be considered eligible to elect ORP as a professional or librarian unless the position requires the professional or librarian qualifications, respectively, as a principal activity. For example, an attorney who fills a position that does not require that the position be filled by an attorney shall not be considered ORP-eligible based solely on the fact that the person is an attorney.

(m) Counselors. The eligibility of counselors shall be determined as follows.

(1) Faculty. If the institution has established policies that consider and treat counselors in the same manner as faculty in such areas as, for example, employment contracts, oversight, and work schedules, then ORP eligibility for a counselor position shall be determined under the same requirements as a faculty position, except that the principal activity shall be counseling rather than teaching and/or research, and the title shall be counselor rather than the faculty titles listed in that category.

(2) Staff. If the institution has established policies that consider and treat counselors in the same manner as staff rather than faculty, in such areas as, for example, employment contracts, oversight, and work schedules, then ORP eligibility for a counselor position shall not be determined under the faculty category. Depending on the duties and required qualifications, a counselor who is considered staff rather than faculty may meet the criteria for one of the non-faculty ORP-eligible positions.

(n) Review of Positions for ORP Eligibility.

(1) Comprehensive Review. ORP employers shall periodically conduct a comprehensive review of all non-classified positions to ensure that ORP eligibility requirements are being applied fairly and consistently across all departments and divisions.

(2) New Position. ORP employers shall analyze newly created non-classified positions for ORP eligibility determination and shall maintain proper documentation of the analysis and determination for future reference.

(3) Re-classified Position. ORP employers shall re-classify a position as ORP-eligible if changes in the position's responsibilities or the employer's organizational structure result in a position that meets the ORP-eligibility requirements.

(A) Option to Elect ORP. ORP employers shall provide the incumbent in a position that is re-classified as ORP-eligible an opportunity to elect ORP as if newly hired into the position.

(B) Initial ORP Eligibility Date. The incumbent's initial ORP eligibility date, as defined by §25.3 of this title (relating to Definitions), shall be the date that the re-classification is effective, unless the re-classification is retro-active to a prior month, in which case, the initial ORP eligibility date shall be the date that the employee is notified of the re-classification.

(o) Administrative Errors.

(1) Orientation Procedures. Each ORP employer shall develop and implement effective orientation and enrollment procedures to ensure appropriate and timely processing of newly eligible employees' retirement plan choices.

(2) Rectification. In the event an administrative error occurs which prevents the normal processing of an ORP-eligible employee's election, the ORP employer shall rectify the error as soon as practicable and in a manner that results in a situation that is as close to the originally expected outcome as possible, within applicable federal and state laws and rules.

(3) Documentation and Prevention. When an administrative error occurs, the ORP employer shall:

(A) maintain documentation of the error and the actions taken by the ORP employer to address the problem, with a copy placed in the employee's file; and

(B) immediately develop and implement appropriate administrative procedures to avoid such errors in the future.

(4) Failure to Notify Error. If an ORP employer fails to notify an ORP-eligible employee of his or her eligible status on or before the employee's initial ORP eligibility date, the ORP employer shall notify the eligible employee as soon as the oversight is discovered. The 90-day ORP election period for the eligible employee shall begin on the date that the employee is notified, and the participation start date shall be determined in accordance with subsection (g) of this section.

(p) Texas Commissioner of Education.

(1) ORP Eligibility. Notwithstanding other provisions in this chapter, the Texas Commissioner of Education shall be eligible to elect ORP in lieu of ERS.

(2) Employment in Higher Education. Notwithstanding other provisions in this chapter, a Texas public institution of higher education shall, for the purpose of determining ORP eligibility for a former Texas Commissioner of Education who is subsequently employed by the institution, treat an election of ORP in lieu of ERS made by the Texas Commissioner of Education at the Texas Education

Agency in the same manner as if the election of ORP had been made in lieu of TRS at another Texas public institution of higher education.

§25.6. Uniform Administration of ORP.

(a) Contributions.

(1) Tax-Deferred. All ORP contributions shall be made on a tax-deferred basis.

(2) IRS Limits on Defined Contributions. Contributions to a participant's ORP account shall not exceed the maximum amount allowed under §415(c) of the Internal Revenue Code of 1986, as amended.

(A) 415(m) Plan. Institutions are authorized by the ORP statute to establish a plan authorized under §415(m) of the Internal Revenue Code of 1986, as amended, for a participant's ORP contributions that exceed the 415(c) limit.

(B) Stopping ORP Contributions. In the absence of a 415(m) plan, an ORP employer shall discontinue ORP contributions for participants who reach the 415(c) limit for the remainder of the applicable plan year.

(C) Interaction with TSA/TDA Program. An employee's contributions under the voluntary supplemental Tax-Sheltered Annuity/Tax-Deferred Account Program shall be included in the 415(c) limit.

(3) No Co-Mingling of ORP and non-ORP Funds.

(A) No Non-Texas ORP Funds. No non-Texas ORP funds may be rolled over or transferred to an ORP account prior to the earlier of the participant's termination of ORP participation or reaching age 70-1/2, other than, as provided in §25.6(b) of this title (relating to Withdrawal of Retirement System Funds), a rollover or transfer of the participant's employee contributions that were made to the applicable retirement system after the employee became eligible to elect ORP but prior to an election of ORP, in accordance with IRS provisions regarding this type of transaction.

(B) No TSA/TDA Funds. Amounts that have been contributed by the participant through the Tax-Sheltered Annuity/Tax-Deferred Account Program, including any amounts that may have been contributed during the employee's 90-day waiting period for membership in the applicable retirement system, may not be rolled over or transferred to an ORP account prior to the earlier of the participant's termination of ORP participation or reaching age 70-1/2.

(C) Texas ORP Contract Required. ORP contributions may only be made to a contract that is authorized by the participant's current ORP employer for Texas ORP contributions, even if the participant already has a contract with a company from a prior period of employment with another employer, whether a Texas ORP employer or not.

(4) No Dual Contributions. A contribution to the applicable retirement system and to an ORP company within the same calendar month shall not be permitted, except when a person terminates employment in a position covered by the applicable retirement system and, prior to the end of the calendar month in which the termination occurs, becomes employed in an ORP-eligible position at a different ORP employer and elects to participate in ORP by signing and submitting the appropriate forms to the ORP employer in such manner that the ORP participation start date is prior to the end of that same calendar month, as provided in §25.4(g) of this title (relating to Participation Start Date).

(5) Eligible Compensation.

(A) **Definition.** For purposes of determining the amount of a participant's ORP contribution, institutions shall use the same definition of eligible compensation that is used for TRS members in §821.001 of the Texas Government Code.

(B) **IRS Limits.** The maximum amount of salary that can be taken into account for ORP purposes shall not exceed the limits established by §401(a)(17) of the Internal Revenue Code of 1986, as amended. An individual who first participated in ORP prior to September 1, 1996, regardless of a subsequent break in service, shall qualify for the "grandfathered" rate established by IRC §401(a)(17).

(C) **415(m) Plan.** Institutions are authorized by the ORP statute to establish a plan authorized under §415(m) of the Internal Revenue Code of 1986, as amended, for a participant's ORP contributions that exceed the 401(a)(17) limit.

(D) **Stopping ORP Contributions.** In the absence of a 415(m) plan, an ORP employer shall discontinue ORP contributions for participants who reach the 401(a)(17) limit for the remainder of the applicable plan year.

(6) **Contribution Rates.** The amount of each participant's ORP contribution shall be a percentage of the participant's eligible compensation as established by the ORP statute and the General Appropriations Act for each biennium. Each contribution shall include an amount based on the employee rate and an amount based on the employer rate.

(A) **Employee Rate.** The employee contribution rate shall neither exceed nor be less than the rate established in the ORP statute for employee contributions.

(B) **Employer Rate.** The employer contribution rate shall consist of a state base rate (minimum), as established each biennium in the General Appropriations Act, and an optional supplemental rate, as provided in subparagraph (C) of this subsection.

(C) **Supplemental Employer Rate.** Institutions may provide a supplement to the state base rate under the following conditions.

(i) **Amount of Supplemental Rate.** The supplemental rate may be any amount that, when added to the state base rate, does not exceed the maximum employer rate established in the ORP statute. For example, if the state base rate is 6 percent and the maximum statutory rate is 8.5 percent, then the supplement may be any amount up to and including 2.5 percent.

(ii) **Component Institution Policies.** Governing boards may establish a supplemental rate policy that covers all component institutions or may establish different policies for one or more individual components.

(iii) **Annual Determination.** The governing board of each institution shall determine the amount of the supplement once per fiscal year, to be effective for the entire fiscal year.

(iv) **Method 1--All Participants.** Institutions may provide the same supplemental rate to all ORP participants, regardless of the participant's first date to participate in ORP or a break in service. If this method is selected, each ORP participant shall receive the same supplemental rate as every other participant.

(v) **Method 2--Two Groups.** Institutions may, instead of providing the same supplemental rate to all participants, provide two different supplemental rates based on a participant's first date to participate in ORP, as follows.

(I) **Grandfathered.** Each participant whose first date to participate in ORP in lieu of the applicable retirement system

at any ORP employer, is prior to September 1, 1995, shall receive the same supplemental rate as other participants in this group, regardless of any break in service. This group of participants shall be referred to as the grandfathered group.

(II) **Non-Grandfathered.** Each participant whose first date to participate in ORP in lieu of the applicable retirement system at any ORP employer is on or after September 1, 1995, shall receive the same supplemental rate as other participants in this group, regardless of any break in service. This group of participants shall be referred to as the non-grandfathered group.

(7) **Proportionality.**

(A) **ORP employers Other than Community Colleges.** Texas public institutions of higher education, not including public community colleges, and the Board shall pay ORP employer contributions on a proportionate basis from the same funding source that a participant's salary is paid from. General Revenue funds may only be used for ORP employer contributions for the portion of a participant's salary that is actually paid with General Revenue.

(B) **Public Community Colleges.** Public community colleges shall pay ORP employer contributions on a proportionate basis from the same funding source that a participant's salary is paid from, except that all participants who are eligible to have all or part of their salary paid from General Revenue shall be eligible for General Revenue funding of their ORP employer contributions for the part of their salaries that is eligible for General Revenue funding, whether or not the salary is actually paid from General Revenue. Eligibility for General Revenue funding shall be based on the Elements of Expenditure.

(C) **Not Applicable to Supplemental Employer Contributions.** The proportionality provisions in this paragraph do not apply to supplemental employer contributions that an ORP employer may make as provided by subparagraph (6)(C) of this subsection.

(8) **Three-Day Submission Deadline.** ORP employers shall send ORP contributions to the ORP company within three business days of legal availability, except for contributions made on a supplemental payroll or contributions that are sent to a grandfathered company with less than 50 participants.

(A) **Legal Availability.** Contributions shall generally be considered legally available on payday. For ORP employers that normally pay participants on a twice-monthly basis, the three-day minimum shall apply to each payday in the month.

(B) **Grandfathered Company.** For purposes of this paragraph, a grandfathered company shall be a company that is no longer on a particular ORP employer's list of authorized ORP companies, but that continues to receive ORP contributions for certain participants as authorized by that ORP employer.

(C) **Exception Deadline.** Contributions that are excepted from the three-day submission deadline shall be sent to the company as soon as practicable, but not later than 10 business days after they are legally available.

(9) **Electronic Funds Transfer (EFT).**

(A) **Requirement.** ORP employers shall send all ORP contributions, including contributions based on a supplemental payroll and contributions sent to a grandfathered company as defined in paragraph (8) of this subsection, to each ORP company by electronic funds transfer (EFT) if the ORP employer is currently able to send funds by EFT and the company is currently able to receive funds by EFT.

(B) Inability to Receive. If a company is unable to receive funds by EFT, the ORP employer shall send contributions to the ORP company by check and provide the following notifications.

(i) Certification. The ORP employer shall certify to the Board, on the ORP employer's annual ORP report as required by subsection (g) of this section, that the company is unable to receive funds by EFT.

(ii) Participant Notification. At least once per fiscal year, the ORP employer shall provide notice to each participant indicating which ORP companies are unable to receive funds by EFT.

(10) Same-Day Credit. ORP companies shall deposit each participant's ORP contributions into the accounts and/or funds designated by the participant effective on the same day that the contributions are received by the company. A company that does not comply with this provision shall not be eligible to be authorized as an ORP company by any ORP employer.

(11) Forfeited ORP Employer Contributions. If a participant forfeits ORP employer contributions under §25.5(a) of this title (relating to Vesting Requirement), the ORP employer shall return the forfeited contributions to the originating fund in accordance with the following procedures.

(A) 93-Day Deadline for Request. Not later than 93 calendar days after the last day of the calendar month in which an unvested participant terminates all employment with all ORP employers, the ORP employer shall send a request to the ORP company or companies for a return of the ORP employer contributions that were sent to the company or companies for that participant during that period of employment. This request may be referred to as a vesting letter because it indicates that the participant has not met the vesting requirement.

(i) 93 Days is Outside Limit. An ORP employer may send the request for forfeited ORP employer contributions immediately upon a participant's termination if the ORP employer has knowledge that the participant has not become employed and is not anticipating becoming employed in a position that is eligible for ORP in lieu of the same retirement system at the same or another ORP employer within the 93-day period.

(ii) If Deadline is Missed. If the ORP employer fails to request the forfeited amounts within the 93-day deadline, then the ORP employer shall make the request immediately upon discovering the oversight, even if the participant later resumes participation after the 93-day deadline as described in subparagraph (B) of this paragraph.

(B) If Participant Returns After 93 Days. If an unvested participant returns to employment that is eligible for ORP in lieu of the same retirement system at the same or another ORP employer and resumes active participation on a date that is more than 93 calendar days after the last day of the calendar month in which he or she previously terminated participation, the participant's unvested ORP employer contributions from the prior period of employment shall still be forfeited, even if the participant subsequently satisfies the vesting requirement.

(C) Forfeited Amount. The forfeited amount shall be the actual amount of ORP employer contributions sent to the participant's ORP accounts during his or her current period of employment.

(i) Excess Amounts not Included. The forfeited amount shall not include any amounts in the participant's ORP account in excess of the actual ORP employer contributions that are attributable to net earnings.

(ii) If Account is Less than Actual Amount. The entire amount of actual ORP employer contributions shall be returned even if the account balance is less than the amount of the actual ORP

employer contributions because of investment loss, transfer, or other occurrence or transaction.

(I) Company's Responsibility. The ORP company shall be responsible for making arrangements to cover any loss of unvested ORP employer contributions, so that the entire amount of actual ORP employer contributions is returned to the ORP employer upon request.

(II) Certification. Before an ORP employer may authorize a company to receive ORP contributions from unvested participants, as provided in subsection (c) of this section, the ORP employer shall require the company to certify that the entire amount of actual unvested ORP employer contributions will be returned upon request. The ORP employer may require the company to indicate what method will be used, for example, restriction of unvested funds to money market or similar accounts.

(D) Company Response Deadline. Within 30 days of receiving the ORP employer's request for a return of unvested ORP employer contributions, the ORP company shall:

(i) process a reimbursement to the ORP employer; and

(ii) send notification of the transaction to the employee indicating the reason for the reduction in the account balance.

(E) Deposit into Originating Fund. The ORP employer shall deposit the reimbursed ORP employer contributions into the originating fund or funds in accordance with instructions from the Texas Comptroller of Public Accounts and any other applicable policies and procedures.

(F) Resumption of Participation within 93 Days.

(i) If unvested ORP employer contributions are returned to the originating fund when the participant did, in fact, resume ORP participation in lieu of the same retirement system at the same or another ORP employer within 93 calendar days of the last day of the calendar month in which the termination of participation occurred, the ORP employer that requested the reimbursement shall, immediately upon being notified of the employee's resumption of participation, return the reimbursed amount to the ORP company for re-deposit into the participant's account.

(ii) The ORP employer with which the participant resumes participation, if not the ORP employer that requested the reimbursement, shall notify the ORP employer that requested the reimbursement of the participant's status as soon as practicable after the participant resumes participation.

(iii) The entire amount of actual ORP employer contributions that were returned to the originating fund under the provisions in this paragraph shall be sent back to the company. There shall be no allowance for any earnings or losses on the ORP employer contributions that may have accrued during the time that the amounts were not in the participant's account.

(b) Withdrawal of Retirement System Funds. An employee who elects to participate in ORP may withdraw any employee contributions (plus accrued interest, if any) that he or she may have accumulated in the applicable retirement system prior to the election of ORP. Employee contributions that were made to the applicable retirement system after the employee became eligible to elect ORP but prior to an election of ORP, including the month in which the ORP election is made, if applicable, may be rolled over or transferred to the participant's ORP account, in accordance with IRS provisions regarding this type of transaction.

(c) ORP Companies.

(1) Authorized by Each ORP Employer. Each ORP employer shall establish its own list of companies that are authorized to provide ORP products to that employer's ORP participants. Governing boards with more than one component institution may establish one list for all components or separate lists for one or more component institutions.

(2) Qualified Companies. Companies authorized by an ORP employer shall be qualified to do business in the state of Texas as determined by the Texas Department of Insurance, the Texas State Securities Board, and any other applicable state or federal agency.

(3) Minimum Number of Companies.

(A) Minimum of Four. Each ORP employer shall authorize a minimum of four qualified companies, including at least one company that offers 403(b)(1) annuity accounts and at least one company that offers 403(b)(7) custodial accounts.

(B) Variety of Choices. Each ORP employer's list of authorized companies and products shall provide a reasonable variety of choices among types of accounts and funds.

(C) No Maximum Number. Each ORP employer may authorize as many ORP companies as the ORP employer deems appropriate.

(4) Return of Unvested Employer Contributions. Before an ORP employer may authorize a company to receive ORP contributions from unvested participants, the ORP employer shall require the company to certify that the entire amount of actual unvested ORP employer contributions will be returned upon request, in accordance with the procedures in paragraph (a)(11) of this section. The ORP employer may require the company to indicate what method will be used, for example, restriction of unvested funds to money market or similar accounts.

(5) Authorization Policies and Procedures. Each ORP employer shall be responsible for establishing local policies and procedures for authorizing or certifying companies to provide ORP products to the ORP employer's ORP participants. Governing boards with more than one component institution may establish one policy for all components or separate policies for one or more component institutions.

(A) Consultants. ORP employers may enlist the assistance of consultants or other outside parties to develop selection criteria.

(B) Objective Selection Process. ORP employers may utilize an objective process to review the quality of ORP products and services and select ORP companies and products using pre-determined standards either in a competitive selection process or in a minimum criteria process. Standards may include performance relative to peer products in the same asset class, costs and fees paid by the participant to participate in the investment products, financial stability of the company, company ratings, and service to participants, including type of service delivery model, company financial counseling, and other services for participating employees. ORP employers may establish additional standards that must be met by ORP companies to remain on the ORP employer's list of authorized companies, such as minimum participation standards.

(C) Participant Requests. ORP employers shall not be required to authorize any ORP company, company representative, or product requested by any participant, although ORP employers may take such requests into account if it may be done in accordance with applicable laws, rules and policies.

(D) Periodic Review of Policies. Each ORP employer shall periodically review and update its authorization or certification policies and procedures.

(E) Periodic Re-Authorization. Each ORP employer shall periodically re-authorize or re-certify companies.

(6) Participant's Change of Companies.

(A) Two Opportunities per Year. Each ORP employer shall provide ORP participants with at least two opportunities during each fiscal year to select a different company from the ORP employer's list of authorized companies. The opportunities may be provided on set dates during the year or on a flexible individualized basis.

(B) Two Changes per Year. Each ORP employer shall allow a participant to change his or her company selection on either or both of the opportunities provided by the ORP employer under subparagraph (A) of this paragraph.

(C) Effective within 35 Days. The ORP employer shall start sending the participant's ORP contributions to his or her newly selected company beginning with the next payroll period if practicable, but not later than 35 days after the date the participant signs and submits the appropriate forms to the ORP employer.

(i) Problems. If the ORP employer cannot comply with this deadline due to circumstances beyond the ORP employer's control, the ORP employer shall notify the participant of the problem and shall provide the participant with an opportunity to change his or her company selection.

(ii) Additional Change. A participant's change of companies made in accordance with clause (i) of this subparagraph shall not be counted against the number of changes required under subparagraph (B) of this paragraph.

(D) Prior Contributions. Amounts contributed by the participant to previously selected ORP companies, including ORP contributions made during prior periods of employment with the same or another ORP employer, shall be under the same statutory distribution restrictions as the contributions in the participant's account with his or her newly selected ORP company.

(E) Transfers of Prior Contributions. Participants may transfer ORP funds that were contributed during the current or prior periods of employment with the same or another ORP employer to another ORP company, but only if their current ORP employer authorizes it after confirming that the funds are being transferred to a valid ORP contract. A transfer of prior contributions shall not be counted against the number of changes required under subparagraph (B) of this paragraph.

(7) Grandfathered Companies.

(A) ORP employers may allow participants to continue contributing to an ORP company that is no longer on the ORP employer's list of authorized companies. Such a company shall be referred to as a grandfathered company.

(B) Institutions may allow participants who directly transfer from another Texas public institution of higher education to continue contributing to the same ORP company that they were contributing to at their prior ORP employer, provided the institution verifies that the contract includes the statutory distribution restrictions.

(8) Confirmation of ORP Contributions. ORP employers shall require ORP companies that receive contributions for the ORP employer's ORP participants to submit confirmation of receipt of funds directly to each participant at least quarterly. The confirmation shall

contain the date and amount of each ORP contribution received during the reporting period.

(9) Confirmation of Funds Transfer. ORP employers shall require ORP companies that receive contributions for the ORP employer's ORP participants to, immediately upon execution of a transfer from one fund or investment or account to another fund or investment or account, submit a confirmation directly to the participant, unless specifically waived by the participant in writing. The confirmation shall include all transfer information, including a statement of any applicable charges.

(10) Required Company Reports. Each ORP employer shall require all ORP companies that receive contributions for the ORP employer's ORP participants to submit, at least annually, a report or reports to each participant having ORP accounts with that company, including accounts that are no longer receiving current contributions, containing the information indicated in paragraphs (11), (12) and (13) of this subsection.

(11) For all accounts, the following information shall be provided:

- (A) name and address of the participant;
- (B) identifying number;
- (C) total payments received during the reporting period;
- (D) expense charges during the reporting period;
- (E) net payments during the reporting period;
- (F) total value of account at the end of the reporting period; and

(G) net cash surrender value of account at the end of the reporting period reflecting all potential charges against the account if it were surrendered for cash as of the last day of the reporting period.

(12) For fixed and variable annuity accounts, the following additional information shall be provided:

(A) interest rate or rates paid on the account from the previous reporting period to the end of the current reporting period; and

(B) where multilevel rates of interest were paid on an account, a breakdown showing the amount in the participant's account at each interest level, the amount of interest earned at each interest level, and the rates of interest. An ORP company may exclude the information required by this subparagraph concerning multilevel rates of interest from the annual report, but if this information is not provided on at least an annual basis, the company shall provide it at any time upon the participant's request.

(13) For variable annuity and custodial accounts, the following additional information shall be provided:

(A) units of each fund or investment or account purchased during the reporting period;

(B) total units of each fund or investment in the account at the end of the reporting period; and

(C) value of unit of each fund or investment or account at the end of the reporting period.

(14) Optional Information. ORP employers may require ORP companies to provide participants with other information in addition to the reporting requirements in paragraph (10) of this subsection, including, but not limited to:

- (A) additional account-related information;

(B) information about the company; and

(C) general educational information related to investments.

(15) Authorized Company Representatives.

(A) Designated Representatives. ORP employers may require ORP companies to designate representatives, or may require that the company and the ORP employer jointly designate representatives, who are authorized to communicate directly with the ORP employer's ORP-eligible employees concerning the company and its products.

(B) Restricted Number. ORP employers may restrict the number of representatives authorized to represent each company.

(C) Brokers. ORP employers may authorize brokers who represent more than one authorized company. Such authorization may be in addition to the number of designated representatives of a particular company.

(D) Representative's ORP Knowledge. ORP employers may require ORP companies to certify that their designated representatives are sufficiently trained and knowledgeable about ORP, including an understanding of the statutory distribution restrictions that must be included in all ORP contracts.

(E) Responsibility to Correct Mistakes. ORP employers may require a company to fully rectify, at the company's cost, any mistakes made by a designated company representative concerning the delivery of incorrect ORP information and any resulting problems.

(16) Solicitation Practices. Each ORP employer shall establish the following procedures related to company solicitation practices.

(A) Sales Presentations. Authorized representatives shall be permitted to make sales presentations to ORP-eligible employees on the ORP employer's premises, under the following conditions:

(i) only at the employee's request;

(ii) as a guest of the employee and ORP employer;

and

(iii) in compliance with the ORP employer's applicable policies and procedures.

(B) Prohibited Gifts. ORP company representatives shall be prohibited from providing gifts or monetary rewards directly or indirectly to any employee of the ORP employer for information on newly eligible employees.

(C) Bulk Campaigning Prohibited. Authorized representatives shall be responsible for providing appropriate sales literature and service at locations designated by the ORP employer. Unless specifically authorized by the ORP employer, ORP company representatives shall be prohibited from using campus bulk mailing (including electronic mail) or telephone campaigning.

(D) Violations. ORP employers shall reserve the right to restrict solicitation privileges of authorized representatives based on violations of the solicitation procedures in this paragraph and each ORP employer's local policies and procedures.

(d) Qualified Domestic Relations Orders (QDROs).

(1) Company Responsibilities. Each ORP employer shall ensure that all ORP contracts include a provision that the ORP company is solely responsible for determining whether a domestic relations order

is qualified and payable in accordance with Texas Government Code, Chapter 804.

(2) **Company Interpretation.** ORP employers may include criteria relating to an ORP company's interpretation of Texas Government Code, Chapter 804, in the ORP employer's ORP company authorization or certification process as provided in subsection (c) of this section.

(e) **Investment Advisory Fees.** Participants may pay certain investment advisory fees with tax-deferred funds in their ORP account in accordance with the following conditions.

(1) Investment advisory fees may only be paid with amounts in a participant's ORP account in accordance with the following provisions.

(A) The investment advisory fees for each fiscal year shall not exceed two percent of the annual value of the participant's account as of the last day of that fiscal year.

(B) The fees shall be paid directly to a registered investment advisor that provides advice to the participant.

(C) The investment advisor to whom the fees are paid shall be registered with the Securities and Exchange Commission and any other applicable federal or state agencies, and shall be engaged full-time in the business of providing investment advice.

(D) The participant and the investment advisor shall enter into a contract for a term of no more than one year. A contract that automatically renews each year shall be considered acceptable as long as both parties have the right to sever the relationship, with reasonable notification, at any time.

(2) An ORP employer shall not prohibit participants from utilizing this right and shall not restrict the payment percentage to less than two percent.

(3) An ORP employer may include in its ORP company authorization or certification process, as provided in subsection (c) of this section, a provision that prohibits commissions to an individual who also receives investment advisory fees for the same ORP account.

(4) An ORP company may request the ORP employer to sign a statement that investment advisory fees are permissible under the plan to provide assurance to the company that it is releasing ORP funds to the advisor in accordance with applicable ORP provisions.

(A) An ORP employer shall not sign the company's form indicating that investment advisory fees are permissible under the plan unless the ORP employer has received satisfactory documentation that the four conditions described in paragraph (1) of this subsection have been met.

(B) An ORP employer shall not sign a form that actually authorizes the payments because that is a relationship between the advisor, the participant and the company.

(f) **Distribution Restrictions.**

(1) **Restricted Access.**

(A) No Pre-Termination Access unless Age 70-1/2. ORP participants shall not access any of their ORP funds by any means until the earlier of the date that they:

(i) terminate all employment with all ORP employers; or

(ii) reach age 70-1/2 years.

(B) No Loans or Hardship Withdrawals.

(i) Loans, financial hardship withdrawals, or any other method that provides a participant with any type of access to ORP funds prior to the earlier of termination of employment or attainment of age 70-1/2 shall not be permitted.

(ii) ORP products may provide for loans or hardship withdrawals after the participant's termination of employment or attainment of age 70-1/2, if permissible under applicable laws and regulations.

(C) **Previously Contributed Amounts.** ORP contributions made during prior periods of employment with the same or another ORP employer and ORP contributions made to previously selected ORP companies with the current ORP employer shall be under the same statutory distribution restrictions as the contributions in the participant's current active account.

(D) **Employment Transfer is not a Termination.** A participant's transfer of employment between Texas public institutions of higher education without a break in service, as defined in §25.3 of this title (relating to Definitions), shall not be considered a termination of employment for ORP purposes, unless the new position is non-benefits-eligible, as defined in §25.5(g) of this title (relating to Employment in a Non-Benefits-Eligible Position).

(E) **Transfer of Funds is not a Termination.** A transfer of ORP funds between ORP accounts or ORP companies shall not be considered a termination of employment for ORP purposes.

(F) **Simultaneous Contributions and Withdrawals.** An ORP participant shall not simultaneously make ORP contributions and withdraw funds from ORP accounts unless that participant is at least age 70-1/2.

(G) **Documentation of Restrictions.** ORP employers shall ensure that all ORP contracts specifically contain the statutory ORP distribution restriction provisions, which are sometimes referred to as the ORP endorsement.

(2) **Authorization to Release ORP Funds.** An ORP company shall not release any ORP funds to a participant until receipt of notification from the participant's ORP employer that a break in service has occurred, except when the participant has reached age 70-1/2, in which case, the ORP company may release funds upon verification that the participant has reached age 70-1/2. The ORP employer's termination notification may be referred to as a vesting letter because it indicates whether the participant has met the ORP vesting requirement.

(A) **Unvested Participants.** If a participant terminates prior to meeting the vesting requirement, the ORP employer's notification shall include a request for the return of the participant's forfeited ORP employer contributions, as provided in §25.6(a)(11) of this title (relating to Forfeited ORP Employer Contributions).

(B) **Vested Participants.** If a participant terminates after meeting the vesting requirement, all funds shall be available in accordance with applicable federal law and contractual provisions, but non-ORP-related early withdrawal penalties, such as additional federal income taxes or contractual surrender fees, may apply depending on factors such as the participant's product selection and age at termination.

(3) **Prohibited Distribution by ORP Company.** If an ORP company provides a participant with any access to ORP funds prior to the earlier of the participant's termination of employment with all ORP employers or attainment of age 70-1/2, then that company shall be responsible for making a prohibited distribution and the following provisions apply.

(A) Redeposit. The participant's ORP employer shall require the company to:

(i) redeposit funds to the employee's ORP account as if no withdrawal had been made; and

(ii) provide written verification to the ORP employer that the account has been fully restored with no adverse impact to the employee.

(B) Company Suspension. The ORP employer may suspend a company from doing further business with the ORP employer's participants at any time a company fails to comply with these provisions.

(C) Separate Transaction Not Related to ORP. A prohibited distribution, such as a loan that is not authorized under the ORP statute, is not related to ORP and shall be treated as a separate transaction between the company and the individual, for example, as an unsecured loan.

(g) ORP Employer Reports.

(1) Required Information. All ORP employers shall submit the following information to the Board:

(A) number of ORP participants;

(B) amount of contributions sent to ORP companies;

(C) list of ORP-eligible positions; and

(D) any other information required by the Board.

(2) Annual Report.

(A) Format. The required information shall be provided in a reporting format developed by the Board, which may include an electronic format.

(B) Due Date. The required information shall be reported on a fiscal year basis and shall normally be due on November 1 of each year for the most recent fiscal year ending August 31.

(3) Additional Information as Needed. ORP employers shall provide additional information to the Board as needed to carry out its functions under the ORP statute, which may be in the form of ad hoc reports, formal or informal surveys, or other format, and may be requested in an electronic format.

(h) Required Notices to Employees.

(1) Basic Information for Newly Eligible Employees. On or before an ORP-eligible employee's initial ORP eligibility date, which is the first day of his or her 90-day ORP election period, each institution shall provide the ORP-eligible employee with written introductory information on ORP developed by the Board and titled, "An Overview of TRS and ORP for Employees Eligible to Elect ORP."

(A) Uniform and Unbiased. The purpose of this notification requirement is to ensure that all employees who become eligible to elect ORP are provided general, uniform and unbiased information on which to base their decision.

(B) Electronic Notification. An institution may meet this notification requirement by:

(i) placing on its website the electronic version of the Overview document that is provided by the Board, and/or placing a link on its website to the Overview document that is available on the Board's website;

(ii) providing the ORP-eligible employee with local internet/intranet access to the electronic version of the document or link; and

(iii) within the required timeframe, notifying the ORP-eligible employee in writing of the location of the electronic version or link.

(C) Employees Subject to 90-Day TRS Waiting Period. Institutions may provide the required ORP information on or before the employee's first date of employment if the employee is subject to the 90-day TRS waiting period. An election of ORP in lieu of TRS may not be made before the employee has satisfied the TRS waiting period, but the ORP employer may encourage ORP-eligible employees to consider their retirement plan choices during the TRS waiting period. Employees who elect ORP as soon as the TRS waiting period has been satisfied will maximize their ORP contributions and minimize the time it takes to satisfy the ORP vesting period.

(2) Participant's ORP Responsibilities. On or before an ORP-eligible employee's initial ORP eligibility date, which is the first day of his or her 90-day ORP election period, each ORP employer shall provide written notification to the ORP-eligible employee that:

(A) an election of ORP entails certain responsibilities for the employee, including selection and monitoring of ORP companies and investments; and

(B) the ORP employer has no fiduciary responsibility for the market value of a participant's ORP investments or for the financial stability of the ORP companies chosen by the participant.

(3) Possible Retiree Group Insurance Eligibility. ORP employers shall include in their normal out-processing procedures for terminated employees, a notification to ORP participants that includes the following information:

(A) the participant's possible future eligibility for retiree group insurance as an ORP retiree;

(B) the ORP employer's policies for handling certification that an ORP participant meets the eligibility requirements for enrollment in retiree group insurance as an ORP retiree; and

(C) a caution to the participant to refrain from withdrawing all of his or her ORP funds if the participant anticipates enrolling in retiree group insurance as an ORP retiree at a later date.

(D) The notification may be either general in nature or specific to each participant.

(4) Verification of Notification Receipt. ORP employers shall develop forms and/or procedures to carry out the notification requirements in this subsection that provide documentation of the employee's acknowledgement of receipt of this information, including the date of receipt, such as a signature or electronic verification.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 3, 2004.

TRD-200402991

Jan Greenberg

General Counsel

Texas Higher Education Coordinating Board

Effective date: May 23, 2004

Proposal publication date: February 20, 2004

For further information, please call: (512) 427-6114



## TITLE 28. INSURANCE

### PART 1. TEXAS DEPARTMENT OF INSURANCE

#### CHAPTER 11. HEALTH MAINTENANCE ORGANIZATIONS

The Commissioner of Insurance adopts amendments to §§11.2, 11.508 and 11.509 concerning basic health care services and state-mandated benefits for health maintenance organizations (HMOs). The amendments to §11.2 and §11.508 are adopted with changes to the proposed text as published in the January 9, 2004, issue of the *Texas Register* (29 TexReg 293). The amendments to §11.509 are adopted without changes and will not be republished.

These amendments are the result of the enactment of Senate Bill (SB) 541 during the 78th Regular Legislative Session. That legislation, among other things, provides more flexibility in the health insurance market by authorizing insurers and HMOs to issue health plans that, in whole or in part, do not include state-mandated benefits. These consumer choice plans are the subject of adopted rules published elsewhere in this issue of the *Texas Register*. In addition, SB 541 amended the definition of "basic health care services" in the HMO Act, Texas Insurance Code Chapter 843, to allow the commissioner to determine those services that an enrolled population might reasonably need to maintain good health, and to delete the requirement that such services include, at a minimum, services designated as basic health care services for federally qualified HMOs under Section 1302, Title XIII, Public Health Service Act (42 U.S.C. Section 300e-1(1)).

The amendments are necessary to comply with SB 541 by identifying basic health care services that are not tied to the specific requirements of federal law. The amendments are also necessary to amend and add definitions consistent with these changes and with the development and issuance of consumer choice plans in the HMO market. In developing a list of basic health care services, the department considered and evaluated the requirements of federal law contained in the existing rule; many of these requirements were retained, although the adopted rule, unlike the existing rule, is comprised primarily of basic services that apply to all persons and removes certain services that are condition-specific. In developing the list, the department also considered the statutes and rules of neighboring states and some of the larger states with populations similar to that of Texas. The department also considered and evaluated those services that were included in evidences of coverage in use in Texas prior to the statutory directive that the federal requirements be considered the minimum standard. Based on the department's analysis of these sources, the department believes the services that are included in the adopted description of basic health care services are those that an enrolled population might reasonably need to maintain good health.

Consistent with SB 541, the amendments also limit the application of some currently required additional mandatory benefit standards for certain group agreements and add coverage requirements for certain services as set forth in §11.508(a)(1)(H)(iv) (cancer screenings as required in Insurance Code Article 3.70-2(H) relating to mammography) and

(vi) (cancer screenings as required in Insurance Code Article 21.53S relating to screening for colorectal cancer).

The department received numerous comments relating to the proposed rule. The greatest number of comments concerned the services the department included, and did not include, in the definition of "basic health care services." On the one hand, physician and provider groups, consumer advocates and representatives of various other organizations asserted that the list of basic health care services should include some specific condition- or gender- related services, including diabetes, HIV/AIDS and family planning services for women. Carriers, on the other hand, contended that the list of basic health care services was too broad and was contrary to the legislative intent of providing more choice and flexibility in the market.

After considering all comments, the department adopted some changes to the proposed sections as published, as follows: (1) The department changed §11.508(a)(1)(E) to clarify that coverage for prenatal services is required only if maternity benefits are provided. (2) The department changed §11.508(a)(1)(G) to clarify that home health services are covered as "prescribed or directed by the responsible physician or other authority designated by the HMO." (3) The department changed §11.508(a)(1)(H)(vii) to remove the requirement that eye and ear examinations for children be provided annually and instead to require that such examinations be provided "in accordance with established medical guidelines." (4) The department added §11.508(a)(1)(H)(viii) to require immunizations for adults as recommended by the United States Department of Health and Human Services Centers for Disease Control. The department believes the strong public health benefit of immunizations makes them, on a select basis for adults, a service necessary to keep an enrolled population in good health. (5) The department changed §11.508(a)(1)(I) to place a 20-outpatient visit minimum requirement upon the provision of short-term mental health services. (6) The department changed §11.508(b)(2) to clarify that maternity benefits includes prenatal, delivery and postdelivery care. (7) The department changed §11.508(d) to clarify that a state-mandated plan must provide coverage for basic health care services without limitation as to time and cost, except for those limitations specifically identified in the rule. This change was necessary to allow for the limitation of required short-term mental health services to 20 outpatient visits. In addition to the foregoing changes, the department also made other changes for purposes of consistency and clarity, including changes necessary to ensure the definitions in §11.2 are in alphabetical order and to correct references to certain statutory provisions that have been revised, as well as to correct clerical and typographical errors.

The amendments to §11.2(b) amend the definition of basic health care service and add definitions for consumer choice plans and state-mandated plans. The amendments in that section also reorganize all of the definitions into alphabetical order and change some of the references to certain provisions of the Insurance Code and other statutory references to reflect recodification and other statutory amendments. The amendments to §11.508 describe basic health care services for group, individual and conversion agreements, including state-mandated plans. The amendments to §11.509 clarify that certain additional mandatory benefit standards must be included in certain group agreements.

General

Comment A commenter testified in favor of the rules and noted that the rules were generally well researched and well thought out.

Agency Response: The department appreciates the comment.

Comment: Commenters state that the rules do not address some other provisions contained in the previous rule that are no longer mandated because of the deletion of the federal requirements. One commenter is concerned that restrictions on copayments for HMOs are much more restrictive than are required for other products. These commenters recommend revisions to §11.506(2)(A) to allow both deductible and copayment options and to remove restrictions on copayment and deductible amounts. These changes, the commenters argue, will enable HMOs to be competitive with non-HMO products already available in the market.

Agency Response: SB 541 changed the definition of "basic health care services," to allow the commissioner to determine those services that an enrolled population might reasonably need to maintain good health and to delete the requirement that such services include, at a minimum, services designated as basic health care services for federally qualified HMOs under Section 1302, Title XII, Public Health Service Act (42 USC Section 300e-1(1)). This was the only statutory change applicable to all HMO plans and this rule implements that statutory requirement. SB 541 also defined "state-mandated health benefits," which may be excluded from a consumer choice plan, to include cost-sharing limitations or restrictions. Therefore, while SB 541 removed restrictions on copayment and deductible amounts for HMO consumer choice plans, it did not remove such restrictions for all HMO plans. The rule implementing SB 541 on consumer choice plans in Chapter 21 clarifies those cost-sharing provisions which may be excluded from an HMO consumer choice plan and the department refers the commenter to that adoption order for greater detail. All HMO plans, including HMO consumer choice plans, must comply with other requirements of the Insurance Code relating to the reasonableness of the cost of coverage, including article 20A.09(k) or 20A.09(b), and §843.082(3).

Comment: A commenter requests that consideration be given to comments received from medical specialty societies, as they will be highly affected by these rules.

Agency Response: The department carefully considers comments from all parties, and recognizes the informed perspective medical specialty societies provide to a rule of this nature, as well as the impact the rule will have on their members.

§§11.2(b)(7) & 11.508(a): A commenter suggests that the list of basic health care services be reviewed periodically. Other commenters suggest that the department revisit the definition and list of basic health care services every two years.

Agency Response: While the department declines to specify a review period, it continuously monitors adopted rules and will propose changes as necessary.

§§11.2, 11.508, 11.509: A commenter believes that the rule still includes federal minimum basic health care services that will not allow health plans to continue to be competitive or allow for flexibility and availability of health coverage intended by the legislature. The commenter requests that the proposed rules be changed to more accurately reflect this legislative intent. The commenter believes that TDI should allow market forces to work and enable small employers and individuals to get some level of

coverage rather than mandate an amount of coverage that isn't affordable. Some commenters recommend deleting the provisions that mandate coverage of: annual eye and ear examinations for children; home health services; mental health services for short-term evaluative or crisis stabilization services; and outpatient services by other providers. The commenters believe that the requirement of coverage for outpatient services is overly broad and may force unnecessary contracts and result in premium increases. Other commenters believe that the list of basic health care services is too limited and does not adequately represent the services that an enrolled population may reasonably need to be maintained in good health.

Agency Response: SB 541 changed the definition of "basic health care services" to allow the commissioner to determine those services that an enrolled population might reasonably need to be maintained in good health and to delete the requirement that such services include, at a minimum, services designated as basic health care services for federally qualified HMOs under Section 1302, Title XII, Public Health Service Act (42 USC Section 300e-1(1)). In developing the list of basic health care services, the department considered many factors, including federally-mandated benefits, laws of states with populations similar to that of Texas, laws of neighboring states, services included in evidences of coverage in Texas prior to adoption of federal requirements as the minimum standard, and comments received during the informal comment period. The rule no longer contains references to certain services that are condition-specific and instead includes those basic services that generally apply to all persons. In developing the list of basic health care services, the department attempted to balance the need for flexible coverage alternatives in the marketplace with the statutory directive to include those services that an enrolled population might reasonably need to maintain good health. While the department declines to remove any additional services from the list of basic health care services, the department notes that it set some guidelines with regard to the provision of certain basic health care services (e.g., prenatal services are required only if maternity benefits are covered, home health services are required but only if prescribed or directed by the responsible physician, eye and ear examinations for children are required in accordance with established medical guidelines rather than annually, and, consistent with the prior rule's requirement, coverage is required for 20 outpatient mental health visits per member per year). In addition, HMOs have the flexibility to apply limitations as to time and cost for HMO consumer choice plans. With regard to the provision requiring coverage for outpatient services by other providers, the department notes that the introductory language in §11.508(a) clarifies that these services are only required when they are provided by "network physicians or providers, or by non-network physicians and providers as set forth in §11.506(10) or (15)." In addition, the use of the word "providers" refers to individual or institutional non-physician health care providers as defined in §11.2. Because these terms and their application are limited, the department does not believe the provision is overly broad or that it will require any unnecessary contracts.

§11.2(b)(59): A commenter finds referencing the lists in adopted §§21.3515-21.3518 in the definition of "state-mandated plan" to be confusing, and questions whether the benefits listed in these sections are required in the state-mandated plan.

Agency Response: A "state-mandated plan" must include all benefits required by law, including those benefits which a health carrier may exclude from a consumer choice health benefit plan.

Accordingly, a state-mandated plan must include the benefits listed in §§21.3515-21.3518, as appropriate for the type of plan issued.

#### §11.508

Comment: A commenter asks if an analysis has been done of what the inclusion of certain basic health care services will do to the cost of the premium and encourages the department to consider the increased costs of benefit and administrative requirements in this analysis.

Agency Response: The department's obligations under SB 541 are to identify, and require coverage for, those services that an enrolled population might reasonably need to maintain good health. In performing this task, the department was mindful of the goals of the legislation, and accordingly, has not added any additional basic health care services that are not necessary to achieve this purpose. The department has, in fact, removed some of those services, especially some that were condition-specific. Because the department has limited or deleted some of the previous basic health care services, and because HMOs have the flexibility to apply limitations as to time and cost for HMO consumer choice plans, the department anticipates that the adopted rule should not result in any increased costs.

Comment: A commenter is concerned that the definition of "basic health care services" for HMOs is not limited as to time and cost, and recommends that these limitations be included.

Agency Response: The department disagrees that general limitations as to time and cost should be allowed for all basic health care services, since Insurance Code Article 20A.09(l) (regarding the provision of basic health care services without limitation as to time and cost) still applies to HMO plans, other than HMO consumer choice plans. However, the rule identifies certain limitations that may apply with respect to coverage for a particular service within the definition of "basic health care services." Specifically, the rule limits the required coverage of short-term mental health services to 20 outpatient visits. Otherwise, the rule requires coverage of basic health care services without limitation as to time and cost for all HMO plans, except HMO consumer choice plans. In addition, the adopted rule on consumer choice plans in Chapter 21 allows the provision of basic health care services in HMO consumer choice plans to be limited by time and cost through deductibles, benefit maximums, and copayments. However, all HMO plans, including HMO consumer choice plans, must comply with other requirements of the Insurance Code relating to the reasonableness of the cost of coverage, including Article 20A.09(k) or 20A.09(b), and §843.082(3).

#### §11.508(a)

Comment: Commenters suggest that the following types of services are "basic" and should be included in the list of basic health care services: treatment of diabetes; treatment of HIV/AIDS; the full range of voluntary family planning services for women; screening for cervical cancer for women; and basic infertility diagnosis and limited treatment for infertility for women. One commenter requests that if coverage is required for specific conditions, TDI make this clear in the final rule.

Agency Response: The department declines to make the requested changes. The legislature in SB 541 recognized the need for individuals and employers to have the opportunity to choose health maintenance organization plans that are more affordable and flexible than existing market health care plans. Accordingly, in developing the new list of basic health care services,

the department sought to focus more specifically on the "services" an HMO would have to provide, as opposed to the conditions it would have to cover. The department has thus removed some references to coverages that are condition-specific. A basic service HMO is still required to provide these coverages as required by state or federal law. The difference is that the authority stems from specific statutory or regulatory requirements, instead of from the list of basic services. For example, the previous list of basic health care services required that "a provision of maternity benefits must provide care for an enrollee and her newborn child as described in the Insurance Code Article 21.53F." While the new list of basic health care services no longer includes this specific requirement, a basic service HMO must still provide it in accordance with the statute. The new list is intended to outline the structure and type of required services that apply to all persons covered by an HMO, and allow market forces and other specific legal requirements determine which conditions are covered. As the department has eliminated specific references to coverages from the previous list of basic health care services, it would not be appropriate to add to the list any new specific coverages, such as treatment for AIDS/HIV. The department notes, however, that Article 3.51-6, §3C forbids a group HMO health plan, other than a consumer choice plan, to exclude or deny coverage for AIDS/HIV.

While the list of basic health care services does not specifically include diabetes care, the rule does require an evidence of coverage to include coverage for diabetes care as required by Insurance Code Article 21.53G. Certain HMO plans would also have to comply with Article 21.53D.

While the Texas Insurance and Administrative Codes are the primary sources for other laws requiring an HMO to cover specific conditions and treatments, the TDI website also contains a mandated benefit chart to provide guidance in this area. Where there is no specific legal direction, the group or individual purchaser and the HMO can decide whether a particular condition-specific service/treatment will be limited or available. For example, while specialty physician services and hospital services are basic health care services, they may not be covered benefits for cosmetic procedures if such procedures are excluded under the plan.

With regard to cervical cancer screenings for women, the department included in the list of basic services only those cancer screenings required by statute, and no statute requires cervical cancer screening for women. The department notes, however, that coverage of this screening is universal among HMOs, as are many other condition-specific coverages not required by law. The statute empowers the commissioner to define basic health care services, and the department will continue to monitor the conditions basic service HMOs cover and consider amending the list as necessary to require coverage of specific conditions as necessary to keep an enrolled population in good health.

The final requested coverages, family planning services for women and infertility treatment and diagnosis, are utilized by a broad segment of the population to varying degrees. As set forth in response to a previous comment, the department considered various factors in developing the list of basic health care services, including federally-mandated benefits, laws of states with populations similar to that of Texas, laws of neighboring states, services included in evidences of coverage in Texas prior to adoption of federal requirements as the minimum standard, and comments received during the informal comment period. The department determined through its review and analysis of these

sources, however, that the level and scope of required coverage of the requested services varied greatly among the states, with a significant number requiring neither family planning nor infertility coverage. Moreover, as mentioned above, SB 541 aims to provide more affordable and flexible health care plans. Consistent with the aims of SB 541, allowing the parties to the coverage contract to determine the level of coverage for family planning/infertility services provides a broader spectrum of plan design and cost-sharing options than is currently available under the federal mandate to cover a broad range of voluntary family planning services. Plans, of course, may continue to offer coverage for services that the rule does not include as basic health care services.

Comment: A commenter suggests that immunizations, in accordance with the U.S. Centers for Disease Control recommended schedule for adults with medical conditions, should be a basic health care service and should be included in the list of basic health care services. Other commenters recommend deletion of the provision that mandates preventive health services including adult immunizations in accord with accepted medical practices. Another commenter requests that if coverage is required for immunizations, TDI make this clear in the final rule.

Agency Response: The previous rule included, as a basic health care service, a broad requirement of immunizations for adults "in accordance with medical practices." The proposed rule deleted this requirement, but, based on comments received, the department has reinstated adult immunizations as a basic health care service. The amended requirement is, however, narrowly drawn to include only immunizations recognized by the United States Department of Health and Human Services Centers for Disease Control Recommended Adult Immunization Schedule by Age Group and Medical Conditions. Immunizations prevent development of communicable diseases in, and transmission of such diseases to, otherwise healthy individuals. Consequently, the department believes the strong public health benefit of immunizations makes them, on a select basis for adults, a necessary and cost-effective service to keep an enrolled population in good health.

Comment: A commenter recommends the list of basic health care services continue to include the language "Diabetes, A provision for the treatment of diabetes, and conditions associated with diabetes pursuant to the Insurance Code Article 21.53G." Another commenter requests that enrollees in plans subject to these rules be assured of services for the prevention and appropriate treatment of diabetes and related conditions.

Agency Response: As set forth in response to previous comments, the department removed condition-related services from the list of basic health care services and whether coverage is available or limited for certain conditions will depend upon various factors, including applicable statutory and regulatory provisions. Because Insurance Code Article 21.53G requires coverage for supplies and services associated with the treatment of diabetes, such coverage does not need to be included as a basic health care service. The department notes, however, that the rule at §11.508(b)(3) requires coverage for "diabetes self-management training, equipment and supplies as required in Insurance Code Article 21.53G." Thus, this coverage is required for all HMO plans, including HMO consumer choice plans. In addition, Insurance Code Article 21.53D requires coverage for diabetes care under certain HMO plans, other than HMO consumer choice plans.

§11.508(a)(1)(F): Commenters request that physical therapy be included as a basic health care service. Other commenters recommend deleting the outpatient rehabilitation therapies mandate, and note that the federal requirements limit this to short-term rehabilitation therapy. Another commenter suggests that distinguishing between outpatient and inpatient services is not an appropriate distinction for physical therapy. Another commenter is concerned that deleting the previous rule's clarifying language that treatment goals may include maintenance of function or slowing of further deterioration from the reference to rehabilitative services may result in the exclusion of that kind of rehabilitative therapy from basic health care services. The commenter asks that the rule make clear that such therapies are basic health care services, and offers proposed language.

Agency Response: As set forth in response to previous comments, the department considered numerous sources in determining what constitutes a basic health care service. Based upon the department's review of these sources, the department concluded that outpatient rehabilitation therapies and inpatient short-term rehabilitation therapy services in an acute hospital setting are necessary to maintain an enrolled population in good health. The department determined that such therapies may be necessary to achieve, for example, successful and cost-effective surgical outcomes, to avoid costly procedures, and to return ill or injured patients to a functional and productive state. Consequently, the department declines to remove these rehabilitation therapies from the list of basic health care services. However, in consumer choice plans an HMO may limit these therapies by time and cost through deductibles, benefit maximums, and copayments. The department recognizes that physical therapy services provided in the outpatient and inpatient settings may be very similar or the same; however the therapies are listed in both locations to clarify that therapy provided in both settings must be covered. While language regarding treatment goals was removed from the rule, the language remains in Texas Insurance Code Article 20A.09(a)(4). Thus, HMO plans, except HMO consumer choice plans, must still provide coverage for such therapies.

§11.508(a)(1)(H)(iv)-(vi): A commenter suggests that the department broaden these references to cancer screenings to allow for advances in medical technology allowing improved and less expensive screening.

Agency Response: The rule's references to cancer screenings are tied to specific statutory requirements. HMOs are free to include in their plans additional types or methods of screening, and as medical science advances, the department expects that plans will include improved and less expensive screening methods. In addition, the department will periodically continue to review the list of basic health care services and update as necessary.

§11.508(b)(2): Commenters recommend that the rule mandate prenatal services only if the policy covers pregnancy.

Agency Response: The department agrees with this comment and has revised the rule accordingly.

#### NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For With Changes: Advocacy, Incorporated; American Diabetes Association; Blue Cross Blue Shield of Texas; Coalition for Texans with Disabilities; Consumers Union; National Multiple Sclerosis Society of Texas; NEXT; Office of Public Insurance Counsel; TFE Company; Texas Association of Businesses; Texas Association of Health Plans; Texas Association of Life and Health

Insurers; Texas Medical Association; Texas Physical Therapy Association; and Women's Health and Family Planning Association of Texas.

## SUBCHAPTER A. GENERAL PROVISIONS

### 28 TAC §11.2

The amendments are adopted under the Insurance Code Article 20A.09N(j) and §§843.002(2), 843.151 and 36.001. Insurance Code Article 20A.09N(j) requires the commissioner to adopt rules as necessary to implement the statutes creating consumer choice plans. Section 843.002(2) provides that basic health care services are those the commissioner determines an enrolled population might reasonably require in order to be maintained in good health. Section 843.151 provides that the commissioner may adopt reasonable rules as necessary and proper to carry out the provisions of Chapters 843 and 20A. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

#### §11.2. Definitions.

(a) The definitions found in the Texas Health Maintenance Organization Act, Texas Insurance Code §843.002, are hereby incorporated into this chapter.

(b) The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Act--The Texas Health Maintenance Organization Act, codified as the Texas Insurance Code Chapters 20A and 843.

(2) Admitted assets--All assets as defined by statutory accounting principles, as permitted and valued in accordance with §11.803 of this title (relating to Investments, Loans, and Other Assets).

(3) Adverse determination--A determination upon utilization review that the health care services furnished or adopted to be furnished to a patient are not medically necessary or not appropriate.

(4) Affiliate--A person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(5) Agent--As defined in the Insurance Code Article 21.07-1, §1(b), unless the context of the rule clearly indicates applicability to any agents licensed under one specific article.

(6) ANHC or approved nonprofit health corporation--A nonprofit health corporation certified under §162.001 of the Occupations Code.

(7) Annual financial statement--The annual statement to be used by HMOs, as promulgated by the NAIC and as adopted by the commissioner under Insurance Code Article 1.11 and §§802.001, 802.003 and 843.155.

(8) Authorized control level--The number determined under the RBC formula in accordance with the RBC instructions.

(9) Basic health care service--Health care services which an enrolled population might reasonably require to maintain good health, as prescribed in §§11.508 and 11.509 of this title (relating to Mandatory Benefit Standards: Group, Individual and Conversion Agreements, and Additional Mandatory Benefit Standards: Group Agreement Only).

(10) Code--The Texas Insurance Code.

(11) Consumer choice plan--A health plan offered by an HMO, as described in Subchapter AA of Chapter 21 of this title (relating to Consumer Choice Health Benefit Plans);

(12) Contract holder--An individual, association, employer, trust or organization to which an individual or group contract for health care services has been issued.

(13) Control--As defined in the Insurance Code §§823.005 and 823.151.

(14) Controlled HMO--An HMO controlled directly or indirectly by a holding company.

(15) Controlled person--Any person, other than an HMO, who is controlled directly or indirectly by a holding company.

(16) Copayment--A charge in addition to premium to an enrollee for a service which is not fully prepaid.

(17) Credentialing--The process of collecting, assessing, and validating qualifications and other relevant information pertaining to a physician or provider to determine eligibility to deliver health care services.

(18) Dentist--An individual provider licensed to practice dentistry by the Texas State Board of Dental Examiners.

(19) General hospital--A licensed establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals requiring diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy; and

(B) regularly maintains, at a minimum, clinical laboratory services, diagnostic X-ray services, treatment facilities including surgery or obstetrical care or both, and other definitive medical or surgical treatment of similar extent.

(20) HMO--A health maintenance organization as defined in Insurance Code §843.002(14).

(21) Health status related factor--Any of the following in relation to an individual:

(A) health status;

(B) medical condition (including both physical and mental illnesses);

(C) claims experience;

(D) receipt of health care;

(E) medical history;

(F) genetic information;

(G) evidence of insurability (including conditions arising out of acts of domestic violence, including family violence as defined by the Insurance Code Article 21.21-5); or

(H) disability.

(22) Individual provider--Any person, other than a physician or institutional provider, who is licensed or otherwise authorized to provide a health care service. Includes, but is not limited to, licensed doctor of chiropractic, dentist, registered nurse, advanced practice nurse, physician assistant, pharmacist, optometrist, registered optician, and acupuncturist.

(23) Institutional provider--A provider that is not an individual. Includes any medical or health related service facility caring

for the sick or injured or providing care or supplies for other coverage which may be provided by the HMO. Includes but is not limited to:

- (A) General hospitals,
- (B) Psychiatric hospitals,
- (C) Special hospitals,
- (D) Nursing homes,
- (E) Skilled nursing facilities,
- (F) Home health agencies,
- (G) Rehabilitation facilities,
- (H) Dialysis centers,
- (I) Free-standing surgical centers,
- (J) Diagnostic imaging centers,
- (K) Laboratories,
- (L) Hospice facilities,
- (M) Infusion services centers,
- (N) Residential treatment centers,
- (O) Community mental health centers,
- (P) Urgent care centers, and
- (Q) Pharmacies.

(24) Limited provider network--A subnetwork within an HMO delivery network in which contractual relationships exist between physicians, certain providers, independent physician associations and/or physician groups which limit the enrollees' access to only the physicians and providers in the subnetwork.

(25) Limited service HMO--An HMO which has been issued a certificate of authority to issue a limited health care service plan as defined in the Insurance Code §843.002.

(26) NAIC--National Association of Insurance Commissioners.

(27) Out of area benefits--Benefits that the HMO covers when its enrollees are outside the geographical limits of the HMO service area.

(28) Pathology services--Services provided by a licensed laboratory which has the capability of evaluating tissue specimens for diagnoses in histopathology, oral pathology, or cytology.

(29) Pharmaceutical services--Services, including dispensing prescription drugs, under the Pharmacy Act, Occupations Code, Chapter 551, that are ordinarily and customarily rendered by a pharmacy or pharmacist.

(30) Pharmacist--An individual provider licensed to practice pharmacy under the Pharmacy Act, Occupations Code, Chapter 551.

(31) Pharmacy--A facility licensed under the Pharmacy Act, Occupations Code, Chapter 551.

(32) Premium--The prospectively determined rate that is paid by or on behalf of an enrollee for specified health services.

(33) Primary care physician or primary care provider--A physician or individual provider who is responsible for providing initial and primary care to patients, maintaining the continuity of patient care, and initiating referral for care.

(34) Primary HMO--An HMO that contracts directly with, and issues an evidence of coverage to, individuals or organizations to arrange for or provide a basic, limited, or single health care service plan to enrollees on a prepaid basis.

(35) Provider HMO--An HMO that contracts directly with a primary HMO to provide or arrange to provide health care services on behalf of the primary HMO within the primary HMO's defined service area.

(36) Psychiatric hospital--A licensed hospital which offers inpatient services, including treatment, facilities and beds for use beyond 24 hours, for the primary purpose of providing psychiatric assessment and diagnostic services and psychiatric inpatient care and treatment for mental illness. Such services must be more intensive than room, board, personal services, and general medical and nursing care. Although substance abuse services may be offered, a majority of beds must be dedicated to the treatment of mental illness in adults and/or children.

(37) Qualified HMO--An HMO which has been federally approved under Title XIII of the Public Health Service Act, Public Law 93-222, as amended.

(38) Quality improvement--A system to continuously examine, monitor and revise processes and systems that support and improve administrative and clinical functions.

(39) RBC--Risk-based capital.

(40) RBC formula--NAIC risk-based capital formula.

(41) RBC Report--Health Risk-Based Capital Report including Overview and Instructions for Companies published by the NAIC and adopted by reference in §11.809 of this title (relating to Risk-Based Capital for HMOs and Insurers Filing the NAIC Health Blank).

(42) Recredentialing--The periodic process by which:

(A) qualifications of physicians and providers are reassessed;

(B) performance indicators, including utilization and quality indicators, are evaluated; and

(C) continued eligibility to provide services is determined.

(43) Reference laboratory--A licensed laboratory that accepts specimens for testing from outside sources and depends on referrals from other laboratories or entities. HMOs may contract with a reference laboratory to provide clinical diagnostic services to their enrollees.

(44) Reference laboratory specimen procurement services--The operation utilized by the reference laboratory to pick up the lab specimens from the client offices or referring labs, etc. for delivery to the reference laboratory for testing and reporting.

(45) Referral specialists (other than primary care)--Physicians or individual providers who set themselves apart from the primary care physician or primary care provider through specialized training and education in a health care discipline.

(46) Schedule of charges--Specific rates or premiums to be charged for enrollee and dependent coverages.

(47) Service area--A geographic area within which direct service benefits are available and accessible to HMO enrollees who live, reside or work within that geographic area and which complies with §11.1606 of this title (relating to Organization of an HMO).

(48) Single service HMO--An HMO which has been issued a certificate of authority to issue a single health care service plan as defined in the Insurance Code §843.002.

(49) Special hospital--A licensed establishment that:

(A) offers services, facilities and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(50) State-mandated plan--A health plan offered by an HMO, that contains coverage for all state-mandated benefits, including those as described in §§21.3515- 21.3518 of this title (relating to State-mandated Health Benefits in Individual HMO Plans, State-mandated Health Benefits in Group HMO Plans, State-mandated Health Benefits in Small Employer HMO Plans, and State-mandated Health Benefits in Large Employer HMO Plans) and offers basic health care services without limitation as to time and cost.

(51) Statutory surplus--Admitted assets minus accrued uncovered liabilities.

(52) Subscriber--If conversion or individual coverage, the individual who is the contract holder and is responsible for payment of premiums to the HMO; or if group coverage, the individual who is the certificate holder and whose employment or other membership status, except for family dependency, is the basis for eligibility for enrollment in the HMO.

(53) Subsidiary--An affiliate controlled by a specified person directly or indirectly through one or more intermediaries.

(54) Telehealth service--As defined in Section 57.042, Utilities Code.

(55) Telemedicine medical service--As defined in Section 57.042, Utilities Code.

(56) Total adjusted capital--An HMO's statutory capital and surplus/total net worth as determined in accordance with the statutory accounting applicable to the annual financial statements required to be filed pursuant to the Insurance Code, and such other items, if any, as the RBC instructions provide.

(57) Urgent care--Health care services provided in a situation other than an emergency which are typically provided in a setting such as a physician or individual provider's office or urgent care center, as a result of an acute injury or illness that is severe or painful enough to lead a prudent layperson, possessing an average knowledge of medicine and health, to believe that his or her condition, illness, or injury is of such a nature that failure to obtain treatment within a reasonable period of time would result in serious deterioration of the condition of his or her health.

(58) Utilization review--A system for prospective or concurrent review of the medical necessity and appropriateness of health care services being provided or proposed to be provided to an individual within this state. Utilization review shall not include elective requests for clarification of coverage.

(59) Voting security--As defined in the Insurance Code §823.007, including any security convertible into or evidencing a right to acquire such security.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403156

Gene C. Jarmon

General Counsel and Chief Clerk

Texas Department of Insurance

Effective date: May 30, 2004

Proposal publication date: January 9, 2004

For further information, please call: (512) 463-6327



## SUBCHAPTER F. EVIDENCE OF COVERAGE

### 28 TAC §11.508, §11.509

The amendments are adopted under the Insurance Code Article 20A.09N(j) and §§843.002(2), 843.151 and 36.001. Insurance Code Article 20A.09N(j) requires the commissioner to adopt rules as necessary to implement the statutes creating consumer choice plans. Section 843.002(2) provides that basic health care services are those the commissioner determines an enrolled population might reasonably require in order to be maintained in good health. Section 843.151 provides that the commissioner may adopt reasonable rules as necessary and proper to carry out the provisions of Chapters 843 and 20A. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

*§11.508. Mandatory Benefit Standards: Group, Individual and Conversion Agreements.*

(a) Each evidence of coverage providing basic health care services shall provide the following basic health care services when they are provided by network physicians or providers, or by non-network physicians and providers as set forth in §11.506(10) or (15) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate):

(1) Outpatient services, including the following:

(A) primary care and specialist physician services;

(B) outpatient services by other providers;

(C) diagnostic services, including laboratory, imaging and radiologic services;

(D) therapeutic radiology services;

(E) prenatal services, if maternity benefits are covered;

(F) outpatient rehabilitation therapies including physical therapy, speech therapy and occupational therapy;

(G) home health services, as prescribed or directed by the responsible physician or other authority designated by the HMO;

(H) preventive services, including:

(i) periodic health examinations for adults as required in Insurance Code Article 20A.09B;

(ii) immunizations for children as required in Insurance Code Article 21.53F §3;

(iii) well-child care from birth as required in Insurance Code Article 20A.09E;

(iv) cancer screenings as required in Insurance Code Article 3.70-2(H) relating to mammography;

(v) cancer screenings as required in Insurance Code Article 21.53F relating to screening for prostate cancer;

(vi) cancer screenings as required in Insurance Code Article 21.53S relating to screening for colorectal cancer;

(vii) eye and ear examinations for children through age 17, to determine the need for vision and hearing correction in accordance with established medical guidelines; and

(viii) immunizations for adults in accordance with the United States Department of Health and Human Services Centers for Disease Control Recommended Adult Immunization Schedule by Age Group and Medical Conditions, or its successor.

(I) no less than 20 outpatient mental health visits per enrollee per year as may be necessary and appropriate for short-term evaluative or crisis stabilization services, which must have the same cost-sharing and benefit maximum provisions as any physical health services; and

(J) emergency services as required by Insurance Code Article 20A.09Y.

(2) Inpatient hospital services, including room and board, general nursing care, meals and special diets when medically necessary, use of operating room and related facilities, use of intensive care unit and services, x-ray services, laboratory and other diagnostic tests, drugs, medications, biologicals, anesthesia and oxygen services, special duty nursing when medically necessary, radiation therapy, inhalation therapy, administration of whole blood and blood plasma, and short-term rehabilitation therapy services in the acute hospital setting.

(3) Inpatient physician care services, including services performed, prescribed, or supervised by physicians or other health professionals including diagnostic, therapeutic, medical, surgical, preventive, referral and consultative health care services.

(4) Outpatient hospital services, including treatment services; ambulatory surgery services; diagnostic services, including laboratory, radiology, and imaging services; rehabilitation therapy; and radiation therapy.

(b) In addition to the basic health care services in subsection (a) of this section, each evidence of coverage shall include coverage for the following:

(1) breast reconstruction as required by federal law if the plan provides coverage for mastectomy. Breast reconstruction is subject to the same deductible or copayment applicable to mastectomy. Breast reconstruction may not be denied because the mastectomy occurred prior to the effective date of coverage;

(2) prenatal services, delivery and postdelivery care for an enrollee and her newborn child as required by federal law, if the plan provides maternity benefits; and

(3) diabetes self-management training, equipment and supplies as required in Insurance Code Article 21.53G.

(c) The benefits described in subsection (a)(1)(F) and (1)(I)(ii) and (vi) of this section do not apply to small employer plans as defined by the Insurance Code Chapter 26.

(d) A state-mandated plan defined in §11.2(b) of this title (relating to Definitions) shall provide coverage for the basic health care

services as described in subsection (a) of this section, as well as all state-mandated benefits as described in §§21.3516- 21.3518 of this title (relating to State-mandated Health Benefits in Individual HMO Plans, State-mandated Health Benefits in Small Employer HMO Plans, and State-mandated Health Benefits in Large Employer HMO Plans), and must provide the services without limitation as to time and cost, other than those limitations specifically prescribed in this section.

(e) Nothing in this title shall require an HMO, physician, or provider to recommend, offer advice concerning, pay for, provide, assist in, perform, arrange, or participate in providing or performing any health care service that violates its religious convictions. An HMO that limits or denies health care services under this subsection shall set forth such limitations in its evidence of coverage.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403157

Gene C. Jarmon

General Counsel and Chief Clerk

Texas Department of Insurance

Effective date: May 30, 2004

Proposal publication date: January 9, 2004

For further information, please call: (512) 463-6327



## CHAPTER 21. TRADE PRACTICES

### SUBCHAPTER AA. CONSUMER CHOICE

### HEALTH BENEFIT PLANS

The Commissioner of Insurance adopts new Subchapter AA, §§21.3501 - 21.3505, 21.3510 - 21.3518, 21.3525 - 21.3530, 21.3535, and 21.3540 - 21.3544, concerning consumer choice health benefit plans. Sections 21.3502, 21.3510 - 21.3518, 21.3530, and 21.3542 are adopted with changes to the proposed text as published in the January 9, 2004, issue of the *Texas Register* (29 TexReg 297). Sections 21.3501, 21.3503 - 21.3505, 21.3525 - 21.3529, 21.3535, 21.3540 - 21.3541, and 21.3543 - 21.3544 are adopted without changes and will not be republished.

These adopted new sections are the result of the enactment of Senate Bill (SB) 541 during the 78th Regular Legislative Session. That legislation added, among other provisions, Texas Insurance Code Arts. 3.80 and 20A.09N, which are designed to increase the availability of health insurance coverage by allowing authorized insurers and health maintenance organizations (HMOs) to issue health plans that, in whole or in part, do not offer or provide state-mandated health benefits. In furtherance of this goal of increased availability and to provide more flexibility in the HMO market, SB 541 also changed the definition of "basic health care services" in the HMO Act, Texas Insurance Code Chapter 843. The department has adopted amendments to a rule implementing this change, which is published elsewhere in this issue of the *Texas Register*. The purpose of these rules is to implement the provisions and the intent of SB 541 by increasing availability of more affordable health benefit plans; developing a well-defined, efficient process for bringing those plans to market; and instituting appropriate safeguards to ensure consumer understanding of and freedom to choose between health benefit plan options.



The department has changed several of the proposed sections as published; however, none of the changes introduce new subject matter or affect additional persons than those subject to the proposal as originally published. In response to comments, the department has changed the various sections as indicated. In §21.2502, the department added definitions for "health insurer" and "HMO" because those terms were included in the text of §§21.3525-21.3528 to clarify the applicability of the notice requirements. The department has added language to §§21.3510, 21.3511, 21.3512, 21.3513, 21.3515, 21.3516, 21.3517, and 21.3518 regarding entitlement to care under Article 21.52B and the requirements of Article 21.52D.

In response to a commenter's request to remove "upon request" from §21.3530(e), the department has added subsection (a)(5) that requires that the written disclosure statement provided to the prospective or current policyholder or contract holder state that the applicant has a right to receive a copy free of charge.

In §21.3542(a), the department added language to clarify that a health carrier must offer consumers the opportunity to apply for a plan with state-mandated benefits when they offer a consumer choice health benefit plan. The offer must be in the same category that most closely approximates the consumer choice health benefit plan offered. In subsection (b)(2), the department removed the words "in writing" from the requirement that health carriers offer consumer alternatives in subsection (a), and replaced it with a requirement that the presentation be identical for both types of plans. In subsection (b)(3), the department revised the rule by taking out the words, "upon request" to clarify that if a health carrier is providing premium cost information on one plan, it must provide that information for the other plan. In subsection (d), the department changed the rule to allow a health carrier to combine on a single form the written affirmation and the acknowledgement of the written disclosure statement required by §21.3530(a)(4). The department has also made minor changes to correct clerical and typographical errors.

Adopted §21.3501 provides for severability of a provision if it's determined to be invalid. Adopted §21.3502 sets forth the definition of terms used in the subchapter. Adopted §21.3503 contains authority for health carriers to offer consumer choice health benefit plans. Adopted §21.3504 contains a severability clause. Adopted §21.3505 provides that the rule applies only to a health plan delivered, issued for delivery, or renewed on or after the effective date of the subchapter. Adopted §§21.3510 - 21.3518 enumerate the benefits considered "state-mandated health benefits," which a health carrier may exclude, for each type of consumer choice health benefit plan a health carrier may offer.

Adopted §21.3525 sets out the notice that health insurers must include on each application for a consumer choice health benefit plan, and §21.3526 sets out the notice that health insurers must include on the policy itself. Adopted §§21.3527 and 21.3528 set out the notices that an HMO must provide on the application and evidence of coverage. Adopted §21.3529 enumerates duties of agents marketing, soliciting, receiving an application for, or administering a consumer choice health benefit plan. Adopted §21.3530 provides requirements for a disclosure which each health carrier offering or providing a consumer choice health benefit plan must provide each prospective or current policyholder. Adopted §21.3535 addresses requirements for health carrier retention of the signed disclosure

statement required by §21.3530 and the written affirmation required by §21.3542. Adopted §21.3540 requires health carriers to include coverage for direct access to the health care services of an obstetrical or gynecological care provider. Adopted §21.3541 requires HMOs offering a consumer choice health benefit plan to provide basic health care services. Adopted §21.3542 requires a health carrier that offers a consumer choice health benefit plan, to offer the purchaser the opportunity to apply for a plan that is in the same category that most closely approximates the consumer choice health benefit plan, and that includes all state-mandated health benefits. The section also requires a health carrier to obtain written affirmation that it offered one of these alternative plans, which may be combined with the written disclosure statement required by §21.3530(a)(4). Adopted §21.3543 details the documents a health carrier must provide when filing a consumer choice health benefit plan with the department. Adopted §21.3544 addresses required annual reporting related to consumer choice health benefit plans which health carriers must make to the department.

## SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS.

### General

**Comment:** A commenter recommends that the department track a number of trends, including the number of companies offering health coverage who did not offer coverage prior to the availability of consumer choice plans, the number of people opting into consumer choice who were previously uninsured, compared to the number switching from state-mandated plans, or those transferring from public health insurance to consumer choice, and the number remaining uninsured; as well as some demographic information about enrollees in state-mandated versus consumer choice plans.

**Agency Response:** The adopted sections require tracking of the number of companies newly offering health coverage which did not offer coverage prior to the availability of consumer choice plans. The department also collects similar data through the annual group accident and health data call and will review the data call form to determine whether additional health plan enrollment information is necessary to monitor enrollment in consumer choice benefit plans and fully-mandated plans. The department is working to identify additional information that health plans can reasonably collect and report, regarding enrollment and financial experience in consumer choice and fully-mandated plans.

**Comment:** A commenter would like the department to track the actuarial impact on state-mandated health benefit plans of consumer choice plans, as well as the average premium costs and cost sharing of the different forms of state-mandated health benefit plans compared to consumer choice plans, including disability status, age, and gender.

**Agency Response:** SB 541 gives health carriers great latitude in designing consumer choice plans. Existing law, to a lesser extent, allows broad flexibility for health carriers to design fully-mandated plans. Both factors complicate the development of "average" premium costs and cost-sharing provisions, as well as cost comparisons between fully-mandated plans and consumer choice benefit plans. Nonetheless, the department is studying ways to track additional relevant actuarial information regarding both consumer choice and fully-mandated plans. Careful consideration of required reporting is essential so as not to contravene one of the purposes of SB 541, which is to provide more affordable health care coverage options.

Comment: A commenter suggests that the department track trends in the number of companies offering health coverage who did not offer health coverage prior to the availability of consumer choice plans, and the percentage of Texans who remain uninsured compared to the percentage during the years preceding the availability of consumer choice plans.

Agency Response: The adopted data collection form includes a question to determine the number of companies offering health coverage who did not offer health coverage prior to the availability of consumer choice plans. The department monitors the percentage of uninsured Texans through the annual Current Population Survey (CPS) conducted by the U.S. Census Bureau.

Comment: A commenter suggests that the department track the effect the availability of consumer choice plans has on the Texas Health Insurance Risk Pool.

Agency Response: The department closely monitors the Risk Pool as part of its statutory duties. Moreover, the department is specifically studying, as directed by SB 467, possible expansion of pool eligibility. The department will consider how to include the impact on the risk pool as part of its ongoing study of reporting requirements, but declines to make any specific changes at this time.

Comment: A commenter recommends that the department convene a workgroup composed of carriers, employers, consumers, and consumer advocates to discuss insurance approaches that focus on health promotion and disease prevention activities.

Agency Response: While the department meets regularly with interested parties and is always open to the possibility of bringing together such groups to consider any improvement in the coverage of health care, the department declines to adopt this suggestion at this time.

Comment: A commenter suggests that the rule require carriers that issue ID cards for consumer choice plans to clearly indicate on the ID card that the patient's coverage is through a consumer choice plan.

Agency Response: The department declines to adopt this requirement at this time. The 78th Texas Legislature enacted certain requirements for ID cards in SB 418. The rule requiring identification of Texas Department of Insurance (TDI) regulated coverage on a managed care plan ID card took effect on January 1, 2004, and the department believes it needs to assess the impact of that rule before considering extending ID card requirements. Moreover, SB 418 also created a verification process which should address concerns regarding the scope of coverage of consumer choice plans.

Comment: A commenter suggests that TDI create educational materials that will clearly delineate what must be provided, at a minimum, in consumer choice health plans.

Agency Response: Consumer choice health plans must provide the same benefits as all other health plans, except for the state-mandated health benefits they may exclude. Various provisions of the Insurance Code and rules, such as Article 26.43 and §843.201, require the plan documents to express in plain language what the plan provides, which should be sufficient for informational and comparison purposes. The department is preparing educational materials concerning consumer choice plans and the various state-mandated health benefits which they may omit.

Comment: A commenter suggests that studies on the costs of mandated benefits are flawed.

Agency Response: The 78th Texas Legislature enacted SB 541 to create more affordable and flexible health care coverage options. The bill specifically authorizes the issuance of coverage that, in whole or in part, does not offer or provide state-mandated health benefits. The department will use the reporting requirements in the statute and rule to monitor the effect of omitting state-mandated health benefits on the cost of health care coverage.

Comment: A commenter believes the rule as drafted is too confusing and complicated; that it will be too costly to interpret, design, file, and seek approval of consumer choice plans; and that health carriers will choose not to file consumer choice health benefit plans.

Agency Response: A good number of health carriers have already filed and received approval of consumer choice health benefit plans. Department staff has provided guidance on the law as necessary and remains ready to assist all other carriers with consumer choice plan filings. Essentially, the rule outlines a simple structure for creating a consumer choice health benefit plan. If a coverage or benefit is listed as a state-mandated health benefit for a particular plan type, then a carrier need not include that coverage or benefit in a consumer choice health benefit plan. For all other plan requirements, a health carrier must simply follow the law as it would apply to any other health benefit plan. The department also notes that SB 541 requires carriers participating in the small employer market to offer a consumer choice plan.

#### Division 2. State Mandated Health Benefits:

Comment: A commenter requests clarification in these sections to reference exclusions for limitations or restrictions on deductibles, coinsurance, copayments, or any annual or lifetime maximum benefit amounts. The commenter also asks for a reference to the exclusion of a specific category of licensed healthcare practitioner in compliance with Texas Insurance Code Article 3.80, §3(a) (2) and (3).

Agency Response: The reference to the requested exclusions is found in §21.3501(8), which, along with SB 541, defines "state-mandated health benefits" to include cost-sharing limitations or restrictions as well as entitlement to care from a specific category of licensed healthcare practitioner. The rule accordingly classifies those items as "state-mandated health benefits" in the various sections of Division 2.

Comment: Commenters question why the complications of pregnancy mandate was not exempted from coverage.

Agency Response: The department determined that the provisions of 28 TAC §21.405(1) do not constitute a "state-mandated health benefit" as defined by SB 541. The rule prohibits a plan from treating complications of pregnancy differently than any other illness or sickness under the policy and it does not create coverage for specific health care services or benefits.

Comment: Commenters question why the Alzheimer's disease mandate was not exempted from coverage.

Agency Response: Article 3.78 does not constitute a "state-mandated health benefit" as defined by SB 541. The statute provides that a clinical diagnosis of Alzheimer's disease by a physician licensed in this state shall satisfy the requirement for demonstrable proof of organic disease or other proof under the

coverage. The statute only applies where the policy already provides coverage for Alzheimer's disease, thus it does not create coverage for specific health care services or benefits.

Comment: Commenters seek clarification regarding administrative mandates allowing enrollees to select a specific category of licensed health care practitioner under Insurance Code Articles 21.52B, 21.52D, 21.52L, 21.53, 21.53B, 21.53L, and 21.53N.

Agency Response: The department appreciates the opportunity to clarify the law, and a response to each mandate follows. Article 21.52B entitles an insured/enrollee to receive care from a specific category of health care practitioners, thus making it a "state-mandated health benefit" under SB 541. In response to comments the department has revised various sections in Division 2 of the rule to include this provision as a state mandated health benefit where appropriate.

SB 541 specifically excludes services of practitioners listed in Articles 21.52 and 3.70-3C from the definition of "state-mandated health benefits." Article 21.52D was not specifically excluded from the definition of state-mandated health benefits under SB 541. Therefore, the requirements of Article 21.52D that exceed the requirements of Article 21.52 and Article 3.70-2 do not apply to consumer choice plans. The department has revised various sections in Division 2 of the rule to reflect this.

The Article 21.52L requirement of health benefit plan coverage for prescription contraceptive drugs and devices do not allow enrollees to select a specific category of licensed health care practitioners.

The department did not include Article 21.53 in the rule as a "state-mandated health benefit," because Article 21.52 entitles an insured/enrollee to receive care from a licensed dentist.

The provisions of Article 21.53B regarding use of osteopathic hospitals is neither plan-specific nor required to be provided. Accordingly, it does not constitute a "state-mandated health benefit" under SB 541.

The pharmacy benefit identification card required by Article 21.53L does not allow enrollees to select a specific category of licensed health care practitioners, nor does it meet any of the other standards required to make it a "state-mandated health benefit." The Article 21.53N requirement of equal pay for reproductive health and oncology services for women does not allow enrollees to select a specific category of licensed health care practitioners, nor does it meet any of the other standards required to make it a "state-mandated health benefit."

Comment: Commenters note that the rule does not provide for an exception to the Article 26.09 point-of-service mandate for HMOs. The commenter believes requiring health plans to offer a point of service option will increase health care costs and should be exempt.

Agency Response: Because SB 541 does not exempt requirements under Article 26.09, carriers must still offer a point-of-service option if a network-based delivery system offered by an HMO is the only plan offered by the employer. Article 26.09 does not apply to small employers.

Comment: A commenter proposes that the department add provisions in the rules so that when mandates are added by the legislature, they can be added into the list in the rules automatically without having to go through the rule amendment process.

Agency Response: The department declines to adopt this suggestion. There is generally sufficient lead time between the passage of legislation and its effective date to allow for rule amendment. In the event the legislature adds additional health mandates, the department would also communicate its interpretation of whether new mandates fit the SB 541 definition of "state-mandated health benefits" at the earliest possible time to facilitate coverage changes prior to rule amendment.

Comment: A commenter questions why federal statutes are not addressed in the rules.

Agency Response: The purpose of the rules is to implement SB 541, which allows exclusion only of "state-mandated health benefits." Articles 3.80(3)(b) and 20A.09N(d) specifically provide that the term "state-mandated health benefits" does not include health benefits that are mandated by federal law. Thus, although a health carrier is not required to include a state-mandated benefit in a consumer choice plan, it must continue to include any similar federally-mandated benefit. For example, a health carrier need not include the state-mandated benefit in Article 21.53I (coverage for reconstructive surgery incident to mastectomy) in a consumer choice plan. The health carrier, however, must still include the federally-mandated coverage for reconstructive surgery after mastectomy set forth in the federal Women's Health and Cancer Rights Act of 1998 (WHCRA).

Comment: A commenter recommends that the proposed regulations list items that are included in policies, instead of items that are excluded. The commenter indicated that listing diabetes care as an excluded item could allow insurers to exclude diabetes equipment, supplies, and self-management programs.

Agency Response: The department declines to revise the rule. Consumer choice policies must include all the same provisions as other policies, except as allowed by SB 541. The rule lists those items that may be excepted. Coverage for diabetes under Article 21.53G is still required for all consumer choice plans.

§21.3512(5) & §21.3518(9)

Comment: Commenters request clarification on the extent of limitations or restrictions on coinsurance, as well as copayments and deductibles that would no longer be imposed. The commenters recommend that the rule allow both deductible and co-payment options for HMOs and also delete restrictions on the amount of copayments and deductibles, which the commenter believes will allow HMOs to compete with other entities offering benefits lower than those required of HMOs.

Agency Response: The rule specifically recognizes as "state-mandated health benefits" existing laws regarding cost-sharing provisions in health plans. These include, for example, 28 TAC §3.3704(a)(6), which governs the difference between levels of coverage in a preferred provider benefit plan, and 28 TAC §11.506(2)(A), which governs the copayments and deductibles an HMO may include in an evidence of coverage. Other laws, however, which are not "state-mandated health benefits," may restrict the extent to which a health carrier may require cost-sharing from an enrollee; one such example is Article 3.70-3C, §8, which requires that a health carrier issuing a preferred provider benefit plan make both levels of benefits reasonably available to all insureds within a designated service area. Carriers must also be prepared to demonstrate compliance with other requirements of the Insurance Code affecting the reasonableness of the cost of coverage, including Articles 1.02(b), 3.42(k), 20A.09(b), 20A.09(k), and §843.082(3).

#### §21.3518

Comment: Commenters question whether this rule extends to prescription drug riders.

Agency Response: Yes, SB 541 allows a health carrier to revise a rider related to a consumer choice health benefit plan in accordance with the new statutory standard.

§§21.3525, 21.3526, 21.3527, 21.3528, 21.3529, 21.3530, 21.3542, and 21.3543

Comment: Some commenters believe the rule's notice, disclosure, reporting, and filing provisions are excessive and will make selling and obtaining these plans difficult for health carriers, employers, and insureds. Other commenters, however, contend that all consumers, including certificate holders, should receive a copy of all notices and disclosures regarding which state-mandated benefits are not included, the comparative premium costs between these plans, and a notice that purchasing one of these plans may limit their future coverage options. In that same vein, some commenters suggested that the department require employers to distribute copies of the signed disclosure document to all covered employees. Other commenters proposed that a notice of what is not covered by a consumer choice health benefit plan must be provided to enrollees, some specifically suggesting amendment of §21.3530(e) and (g) to require carriers to provide the notices to enrollees and certificate holders. Commenters cited concern as to whether a consumer whose employer purchases a consumer choice health benefit plan will receive any of the notices proposed by TDI.

Agency Response: Commenters have expressed various opposing viewpoints on the notice and disclosure provisions. The department drafted the proposal so as to balance the consumers' need for adequate and meaningful disclosure with the carriers' interest in simplifying compliance. The department notes that with regard to notice to all enrollees, a certificate holder must be provided a certificate of coverage as required by statute, which will reveal the extent to which a consumer choice plan provides coverage. The department thus declines at this time to extend notice and disclosure requirements to the extent requested by some commenters. The department also notes that SB 541 does not authorize it to require an employer to make distributions of notices to their employees. The law places group policyholders in a position of responsibility for certificate holders, and the law requires health carriers to provide the group policyholder with all required notices and disclosures.

With regard to the comments regarding the excessiveness of notices, disclosures, filings, and reporting, many of the duties the rule imposes are the result of statutory direction. The new statutory provisions at Articles 3.80, §5 and 20A.09N (f) require the notices addressed by §§21.3525 -- 21.3528. To clarify the applicability of these sections, the department has added language specifying that the notices in §§21.3525 and 21.3526 apply to only health insurers and the notices in §§21.3527 and 21.3528 apply only to HMOs. The duties of agents set out in §21.3529 derive from the direction in the statutory notice to all prospective and current insureds or contract holders to consult with their agent regarding which state-mandated benefits are excluded under the plan, Articles 3.80 §5 and 20A.09N(f), as well as from the duty of health carriers to provide certain disclosures to prospective and current policyholders and contract holders, Articles 3.80, §6 and 20A.09N(g). Article 3.80, §6 and Article 20A.09N(g) prescribe the form of disclosures addressed by §21.3530(a) and (b)

and Form CCP 1. Section 21.3530(a)(5) and (e) clarify the carrier's statutory duties both to provide--and retain--the disclosure statement. Section 21.3530(c) and (d) address the timing of the disclosure and not its content. Section 21.3530(f) requires disclosure in a manner which recognizes the similarity between association and individual coverage.

The department based the written affirmation requirement of §21.3542(d) on its experience with marketing of the promulgated basic and catastrophic small employer health benefit plans. In response to comments, the department has revised this subsection to provide that a health carrier may combine this written affirmation on a single form with the acknowledgement of the written disclosure statement required in §21.3530(a)(4). Finally, the plan filing requirements in §21.3543 generally follow existing plan filing requirements of the department, with the exception of calculations essential for providing rate information required by the statute in Article 3.80, §9 and Article 20A.09N(l). For example, §21.3543(2)(B) requires a carrier to include a statement of the reduction in premium resulting from the differences in coverage and design between the consumer choice health benefit plan and an identical plan with all the state-mandated health benefits.

#### §21.3530(a)(3)

Comment: A commenter recommends deletion, for plans other than individual plans, of the requirement that the written disclosure state that purchase of the plan may limit future coverage options.

Agency Response: The department believes the requirement is essential to ensure adequate disclosure for markets such as small employer, or an individual participating in an association group plan, and can be included as part of the disclosure already required by statute.

#### §21.3530(e)

Comment: A commenter suggests striking the phrase "upon request," as a consumer should have the opportunity to review the disclosure along with other marketing materials outside the pressure of a sales meeting.

Agency Response: The rule requires a health carrier to furnish a copy of the disclosure to the consumer upon request. The purpose of SB 541, to increase flexibility and decrease the cost of health care coverage, supports providing a copy of the disclosure only when the consumer requests it. The department has changed the proposal by adding §21.3530(a)(5) to require that the disclosure state that the applicant has a right to receive a copy free of charge. The department will monitor carrier practices and consumer comments and will consider amending the rule if additional requirements are necessary to ensure that consumers have a full and fair opportunity to review the disclosure.

#### §21.3542

Comment: A commenter states that the section appears to require that a health carrier offering one or more consumer choice health benefit plans must also make available a policy that is comparable to each consumer choice health benefit plan. The commenter reads this section to require a health carrier to offer a distinctive policy form as a complement to each consumer choice plan. The commenter asserts that such a provision would exceed the statutory requirement.

Agency Response: The rule does not necessarily require an offer of a unique plan which includes all state-mandated benefits

to correspond to each consumer choice plan a health carrier offers. SB 541 seeks to provide consumers additional affordable health coverage options from which to choose. To implement this goal, §21.3542 requires a health carrier to offer plans that include all state-mandated benefits in accordance with the type and number of consumer choice plans it offers. As an example, if a health carrier offers several different consumer choice major medical indemnity plans, then the health carrier could satisfy this requirement by offering one fully-mandated major medical indemnity plan. Alternatively, if a health carrier were offering one consumer choice hospital-surgical indemnity plan and one consumer choice major medical indemnity plan, then the carrier would have to offer one fully-mandated hospital-surgical indemnity plan and one fully-mandated major medical indemnity plan. In response to the comment, the department has revised the term "comparable" to "the same category that most closely approximates." The department has also added language to clarify the limitations on the carrier's duty in this context.

#### §21.3542(b)(3)

Comment: A commenter suggests that this section requires a carrier to reflect numerous items showing the difference between a consumer choice plan and a fully mandated plan. The commenter believes this requirement does not come from statute and asks for its removal.

Agency Response: SB 541 requires the offer of a policy or evidence of coverage with state-mandated health benefits. Many of the section's requirements concern essential elements of the acquisition of health care coverage, for example, the requirement to provide a summary of benefits under Article 26.71, an outline of coverage under 28 TAC §§3.3090 and 3.3093, and the disclosure requirements under §843.205. The other provisions simply assure fair marketing of both state-mandated health plans and consumer choice plans. The department has clarified the requirements to simplify administration of and compliance with the rule.

#### §21.3542(b)(3)

Comment: A commenter suggests striking the phrase "upon request," as consumers pay for the privilege of completing an application and should be entitled to information about premium cost and an explanation of the differences between plans.

Agency Response: The department has revised the rule to clarify a health carrier's duty under this requirement, which is to present the fully-mandated plan in the same manner as it presents the consumer choice plan. The adopted rule requires presentation of such elements as premium cost, outline of coverage, and marketing materials in the same manner, for both consumer choice plans and fully-mandated plans. Accordingly, if a health carrier is providing premium cost information on one plan, the rule requires that it provide that information in the same format for the other plan as well.

#### §21.3542(d)

Comment: A commenter suggests that, to avoid confusion, this should be part of the disclosure document signed by the consumer.

Agency Response: The department agrees with this suggestion and has revised the rule to give health carriers the option of combining these documents.

#### §21.3544

Comment: A commenter suggests that the reporting requirements enumerated under this section are not required by statute, are burdensome and expensive, and asks for their removal.

Agency Response: The department declines to make this change. In SB 541, the Legislature sought to provide Texans with "more affordable and flexible" health coverage options, as well as increase availability of health coverage, by allowing carriers to offer coverage that does not include state-mandated health benefits. To determine whether SB 541 and the consumer choice plans achieve these intended effects, the department must collect information sufficient to determine whether the advent of such plans expanded health coverage options beyond that currently available under plans with all state-mandated health benefits. As an example, the department must be able to differentiate between changes to coverage for populations with existing coverage and coverage provided for those not previously covered. The public benefits derived from documenting the costs and benefits of consumer choice plans over currently available plans justifies the expense to carriers to document such changes.

Moreover, the rule's required reports complement existing reporting requirements. For example, small employer carriers already report much of this rule's required information in existing Figure 48. The department intends to align existing Figure 48 reporting requirements with new SB 541 requirements to eliminate any duplication. Moreover, Insurance Code §38.252 requires the commissioner to designate by rule the data that health carriers must collect and report to "determine the impact of mandated benefits and mandated offers of coverage." Providing data from SB 541 plans comparable to that obtained in connection with mandated benefits is critical to evaluate the effectiveness of consumer choice plans.

#### §21.3544(5)

Comment: A commenter suggests that the department collect information for both consumer choice health benefit plans and fully-mandated plans, to obtain adequate information for meaningful analysis of the impact of consumer choice plans on the ranks of the uninsured.

Agency Response: The department already collects this information for small employer health benefit plans, which comprise approximately one third of the fully-insured population in Texas. This practice will provide figures for analysis. Moreover, the consumer choice data collection form and data collected through the annual group accident and health data call will allow for additional comparison of the two types of plans in both the small and large employer markets.

#### NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

FOR WITH CHANGES: Advocacy, Incorporated; American Diabetes Association; Blue Cross Blue Shield of Texas; Coalition for Texans with Disabilities; Community First Health Plans, Inc.; Consumers Union; National Multiple Sclerosis Society of Texas; NEXT; Office of Public Insurance Counsel; TFE Company; Texas Association of Business; Texas Association of Health Plans; Texas Association of Life and Health Insurers; Texas Medical Association; Texas Physical Therapy Association; and Women's Health And Family Planning Association of Texas.

#### DIVISION 1. GENERAL PROVISIONS

#### 28 TAC §§21.3501 - 21.3505

The new sections are adopted under the Insurance Code Articles 3.80, §7, 20A.09N(j), and §36.001. Articles 3.80, §7 and 20A.09N(j) require the commissioner to adopt rules as necessary to implement the statutes creating consumer choice health benefit plans. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

*§21.3502. Definitions.*

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Basic health care services--Health care services that the commissioner determines an enrolled population might reasonably need to be maintained in good health.

(2) Commissioner--The commissioner of insurance.

(3) Consumer choice health benefit plan--A group or individual accident or sickness insurance policy, or evidence of coverage that, in whole or in part, does not offer or provide state-mandated health benefits, but that provides creditable coverage as defined by Insurance Code Article 26.035(a) or Article 3.70-1.

(4) Consumer choice of benefits health insurance plan--A consumer choice health benefit plan.

(5) Department--The Texas Department of Insurance.

(6) HMO--a person defined in Insurance Code §843.002(14).

(7) Health carrier--Any entity authorized under the Insurance Code or another insurance law of this state that provides health benefits in this state, including an insurance company, a group hospital service corporation under Insurance Code Chapter 842, a health maintenance organization under Insurance Code Article 20A and Chapter 843, and a stipulated premium company under Insurance Code Chapter 884.

(8) Health insurer--Any entity authorized under this code or another insurance law of this state that provides health insurance or health benefits in this state, including an insurance company, a group hospital service corporation under Chapter 842 of the Insurance Code, and a stipulated premium company under Chapter 884 of the Insurance Code.

(9) Standard health benefit plan--A consumer choice health benefit plan.

(10) State-mandated health benefits--

(A) Coverage required under the Insurance Code, this code, or other law of this state to be provided in an individual, blanket, or group policy for accident and health insurance, a contract for coverage of a health-related condition, or an evidence of coverage that:

(i) includes coverage for specific health care services or benefits;

(ii) places limitations or restrictions on deductibles, coinsurance, copayments, or any annual or lifetime maximum benefit amounts, including limitations provided in Insurance Code Article 20A.09(l) (as added by Section 7, Chapter 1026, Acts of the 75th Legislature, Regular Session, 1997); or

(iii) includes a specific category of licensed health care practitioner from whom an insured or enrollee is entitled to receive care.

(B) Do not include benefits or coverage mandated by federal law, or standard provisions or rights required under the Insurance Code, this code, or other law of this state, to be provided in an individual, blanket, or group policy for accident and health insurance, a contract for coverage of a health-related condition, or an evidence of coverage unrelated to specific health illnesses, injuries, or conditions of an insured or enrollee, including those benefits or coverages enumerated in Insurance Code Articles 3.80, §3(b) and 20A.09N(d).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 13, 2004.

TRD-200403232

Gene C. Jarmon

General Counsel and Chief Clerk

Texas Department of Insurance

Effective date: June 2, 2004

Proposal publication date: January 9, 2004

For further information, please call: (512) 463-6327



## **DIVISION 2. STATE-MANDATED HEALTH BENEFITS**

### **28 TAC §§21.3510 - 21.3518**

The new sections are adopted under the Insurance Code Articles 3.80, §7, 20A.09N(j), and §36.001. Articles 3.80, §7 and 20A.09N(j) require the commissioner to adopt rules as necessary to implement the statutes creating consumer choice health benefit plans. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

#### *§21.3510. State-mandated Health Benefits in Individual Indemnity Policies.*

The following enumerated items are state-mandated health benefits a health insurer does not have to include in an individual indemnity consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(3) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(4) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(5) limitations or restrictions on coinsurance imposed by §3.3704(a)(6) of this title (relating to Freedom of Choice: Availability of Preferred Providers);

(6) coverage of a minimum stay for mastectomy treatment/services as required by Insurance Code Article 21.52G;

(7) coverage of diabetes care as required by Insurance Code Article 21.53D;

(8) coverage of telehealth and telemedicine as required by Insurance Code Article 21.53F;

(9) coverage of off-label drugs as required by Insurance Code Article 21.53M;

(10) coverage of mental/nervous disorders with demonstrable organic disease as required by §3.3057(d) of this title (relating to Standards for Exceptions, Exclusions, and Reductions Provision);

(11) coverage of transplant donor coverage as required by §3.3040(h) of this title (relating to Prohibited Policy Provisions);

(12) offer of coverage for therapies for children with developmental delays as required by Insurance Code Article 21.53F;

(13) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(14) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

*§21.3511. State-mandated Health Benefits in Group Association Indemnity Policies.*

The following enumerated items are state-mandated health benefits that a health insurer does not have to include in a group association indemnity consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(3) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(4) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(5) limitations or restrictions on coinsurance imposed by §3.3704(a)(6) of this title (relating to Freedom of Choice: Availability of Preferred Providers);

(6) the offer of in vitro fertilization coverage as required by Insurance Code Article 3.51-6, §3A;

(7) coverage of HIV, AIDS, or HIV-related illnesses as required by Insurance Code Article 3.51-6, §3C;

(8) coverage of chemical dependency and stays in a chemical dependency treatment facility as required by Insurance Code Article 3.51-9;

(9) coverage of serious mental illness as required by Insurance Code Article 3.51-14;

(10) the offer of mental or emotional illness coverage as required by Insurance Code Article 3.70-2(F);

(11) coverage of inpatient mental health and stays in a psychiatric day treatment facility as required by Insurance Code Article 3.70-2(F);

(12) the offer of speech and hearing coverage as required by Insurance Code Article 3.70-2(G);

(13) the offer of home health care coverage as required by Insurance Code Article 3.70-3B;

(14) coverage of stays in a crisis stabilization unit and/or residential treatment center for children and adolescents as required by Insurance Code Article 3.72;

(15) coverage of a minimum stay for mastectomy treatment/services as required by Insurance Code Article 21.52G;

(16) continuation of coverage of certain drugs under a drug formulary as required by Insurance Code Article 21.52J;

(17) coverage of diagnosis and treatment affecting temporomandibular joint and treatment for a person unable to undergo dental treatment in an office setting or under local anesthesia as required by Insurance Code Article 21.53A;

(18) coverage of bone mass measurement for osteoporosis as required by Insurance Code Article 21.53C;

(19) coverage of diabetes care as required by Insurance Code Article 21.53D;

(20) coverage of telehealth and telemedicine as required by Insurance Code Article 21.53F;

(21) coverage of off-label drugs as required by Insurance Code Article 21.53M;

(22) offer of coverage for therapies for children with developmental delays as required by Insurance Code Article 21.53F;

(23) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(24) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

*§21.3512. State-mandated Health Benefits in Small Employer Indemnity Policies.*

The following enumerated items are state-mandated health benefits that a health insurer does not have to include in a small employer group indemnity consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(3) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(4) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(5) limitations or restrictions on coinsurance imposed by §3.3704(a)(6) of this title (relating to Freedom of Choice: Availability of Preferred Providers);

(6) the offer of in vitro fertilization coverage as required by Insurance Code Article 3.51-6, §3A;

(7) coverage of HIV, AIDS, or HIV-related illnesses as required by Insurance Code Article 3.51-6, §3C;

(8) coverage of chemical dependency and stays in a chemical dependency treatment facility as required by Insurance Code Article 3.51-9;

(9) the offer of serious mental illness coverage as required by Insurance Code Article 3.51-14;

(10) the offer of mental or emotional illness coverage as required by Insurance Code Article 3.70-2(F);

(11) coverage of inpatient mental health and stays in a psychiatric day treatment facility as required by Insurance Code Article 3.70-2(F);

(12) the offer of speech and hearing coverage as required by Insurance Code Article 3.70-2(G);

(13) the offer of home health care coverage as required by Insurance Code Article 3.70-3B;

(14) coverage of stays in a crisis stabilization unit and/or residential treatment center for children and adolescents as required by Insurance Code Article 3.72;

(15) coverage of bone mass measurement for osteoporosis as required by Insurance Code Article 21.53C;

(16) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(17) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

*§21.3513. State-mandated Health Benefits in Large Employer Indemnity Policies.*

The following enumerated items are state-mandated health benefits that a health insurer does not have to include in a large employer group indemnity consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(3) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(4) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(5) limitations or restrictions on coinsurance imposed by §3.3704(a)(6) of this title (relating to Freedom of Choice: Availability of Preferred Providers);

(6) the offer of in vitro fertilization coverage as required by Insurance Code Article 3.51-6, §3A;

(7) coverage of HIV, AIDS, or HIV-related illnesses as required by Insurance Code Article 3.51-6, §3C;

(8) coverage of chemical dependency and stays in a chemical dependency treatment facility as required by Insurance Code Article 3.51-9;

(9) the offer of mental or emotional illness coverage as required by Insurance Code Article 3.70-2(F);

(10) coverage of inpatient mental health and stays in a psychiatric day treatment facility as required by Insurance Code Article 3.70-2(F);

(11) the offer of speech and hearing coverage as required by Insurance Code Article 3.70-2(G);

(12) the offer of home health care coverage as required by Insurance Code Article 3.70-3B;

(13) coverage of stays in a crisis stabilization unit and/or residential treatment center for children and adolescents as required by Insurance Code Article 3.72;

(14) coverage of a minimum stay for mastectomy treatment/services as required by Insurance Code Article 21.52G;

(15) continuation of coverage of certain drugs under a drug formulary as required by Insurance Code Article 21.52J;

(16) coverage of diagnosis and treatment affecting temporomandibular joint and treatment for a person unable to undergo dental treatment in an office setting or under local anesthesia as required by Insurance Code Article 21.53A;

(17) coverage of bone mass measurement for osteoporosis as required by Insurance Code Article 21.53C;

(18) coverage of diabetes care as required by Insurance Code Article 21.53D;

(19) coverage of telehealth and telemedicine as required by Insurance Code Article 21.53F;

(20) coverage of off-label drugs as required by Insurance Code Article 21.53M;

(21) offer of coverage for therapies for children with developmental delays as required by Insurance Code Article 21.53F;

(22) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(23) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

*§21.3514. State-mandated Health Benefits in Blanket Indemnity Policies.*

The category of group to which the health carrier is issuing coverage determines which benefits are state-mandated health benefits for blanket indemnity insurance policies.

*§21.3515. State-mandated Health Benefits in Individual HMO Plans.*

The following enumerated items are state-mandated health benefits that an HMO does not have to include in an individual HMO consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of childhood immunizations as required by Insurance Code Article 20A.09F;

(3) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(4) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(5) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(6) treatment by a non-primary care specialist as a primary care provider as required by Insurance Code Article 20A.09(a)(3)(D);

(7) coverage of rehabilitation therapies as required by Insurance Code Article 20A.09(a)(4);

(8) limitations or restrictions on copayments imposed by §11.506(2)(A) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate);

(9) limitations or restrictions on deductibles imposed by §11.506(2)(B) of this title;



(10) coverage of a minimum stay for mastectomy treatment/services as required by Insurance Code Article 21.52G;

(11) coverage of diabetes care as required by Insurance Code Article 21.53D;

(12) coverage of telehealth and telemedicine as required by Insurance Code Article 21.53F;

(13) coverage of off-label drugs as required by Insurance Code Article 21.53M;

(14) offer of coverage for therapies for children with developmental delays as required by Insurance Code Article 21.53F;

(15) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(16) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

*§21.3516. State-mandated Health Benefits in Group HMO Plans.*

The following enumerated items are state-mandated health benefits that an HMO does not have to include in a non-employer group HMO consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of childhood immunizations as required by Insurance Code Article 20A.09F;

(3) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(4) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(5) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(6) treatment by a non-primary care specialist as a primary care provider as required by Insurance Code Article 20A.09(a)(3)(D);

(7) coverage of rehabilitation therapies as required by Insurance Code Article 20A.09(a)(4);

(8) limitations or restrictions on copayments imposed by §11.506(2)(A) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate);

(9) limitations or restrictions on deductibles imposed by §11.506(2)(B) of this title;

(10) the offer of in vitro fertilization coverage as required by Insurance Code Article 3.51-6, §3A;

(11) coverage of HIV, AIDS, or HIV-related illnesses as required by Insurance Code Article 3.51-6, §3C;

(12) coverage of chemical dependency and stays in a chemical dependency treatment facility as required by Insurance Code Article 3.51-9;

(13) coverage of serious mental illness as required by Insurance Code Article 3.51-14;

(14) the offer of mental or emotional illness coverage as required by Insurance Code Article 3.70-2(F);

(15) coverage of inpatient mental health and stays in a psychiatric day treatment facility as required by Insurance Code Article 3.70-2(F);

(16) the offer of speech and hearing coverage as required by Insurance Code Article 3.70-2(G);

(17) coverage of stays in a crisis stabilization unit and/or residential treatment center for children and adolescents as required by Insurance Code Article 3.72;

(18) coverage of a minimum stay for mastectomy treatment/services as required by Insurance Code Article 21.52G;

(19) continuation of coverage of certain drugs under a drug formulary as required by Insurance Code Article 21.52J;

(20) coverage of diagnosis and treatment affecting temporomandibular joint and treatment for a person unable to undergo dental treatment in an office setting or under local anesthesia as required by Insurance Code Article 21.53A;

(21) coverage of bone mass measurement for osteoporosis as required by Insurance Code Article 21.53C;

(22) coverage of diabetes care as required by Insurance Code Article 21.53D;

(23) coverage of telehealth and telemedicine as required by Insurance Code Article 21.53F;

(24) coverage of off-label drugs as required by Insurance Code Article 21.53M;

(25) offer of coverage for therapies for children with developmental delays as required by Insurance Code Article 21.53F;

(26) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(27) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

*§21.3517. State-mandated Health Benefits in Small Employer HMO Plans.*

The following enumerated items are state-mandated health benefits that an HMO does not have to include in a small employer group HMO consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of childhood immunizations as required by Insurance Code Article 20A.09F;

(3) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(4) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(5) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(6) treatment by a non-primary care specialist as a primary care provider as required by Insurance Code Article 20A.09(a)(3)(D);

(7) coverage of rehabilitation therapies as required by Insurance Code Article 20A.09(a)(4);

(8) limitations or restrictions on copayments imposed by §11.506(2)(A) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate);

(9) limitations or restrictions on deductibles imposed by §11.506(2)(B) of this title;

(10) the offer of in vitro fertilization coverage as required by Insurance Code Article 3.51-6, §3A;

(11) coverage of HIV, AIDS, or HIV-related illnesses as required by Insurance Code Article 3.51-6, §3C;

(12) coverage of chemical dependency and stays in a chemical dependency treatment facility as required by Insurance Code Article 3.51-9;

(13) the offer of serious mental illness coverage as required by Insurance Code Article 3.51-14;

(14) the offer of mental or emotional illness coverage as required by Insurance Code Article 3.70-2(F);

(15) coverage of inpatient mental health and stays in a psychiatric day treatment facility as required by Insurance Code Article 3.70-2(F);

(16) the offer of speech and hearing coverage as required by Insurance Code Article 3.70-2(G);

(17) coverage of stays in a crisis stabilization unit and/or residential treatment center for children and adolescents as required by Insurance Code Article 3.72;

(18) coverage of bone mass measurement for osteoporosis as required by Insurance Code Article 21.53C;

(19) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(20) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

*§21.3518. State-mandated Health Benefits in Large Employer HMO Plans.*

The following enumerated items are state-mandated health benefits that an HMO does not have to include in a large employer group HMO consumer choice health benefit plan:

(1) coverage of contraceptive drugs and devices as required by Insurance Code Article 21.52L and §21.404(3) of this title (relating to Underwriting);

(2) coverage of childhood immunizations as required by Insurance Code Article 20A.09F;

(3) coverage of a minimum stay for maternity as required by Insurance Code Article 21.53F;

(4) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Article 21.53I;

(5) coverage of acquired brain injury treatment/services as required by Insurance Code Article 21.53Q;

(6) treatment by a non-primary care specialist as a primary care provider as required by Insurance Code Article 20A.09(a)(3)(D);

(7) coverage of rehabilitation therapies as required by Insurance Code Article 20A.09(a)(4);

(8) limitations or restrictions on copayments imposed by §11.506(2)(A) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate);

(9) limitations or restrictions on deductibles imposed by §11.506(2)(B) of this title;

(10) the offer of in vitro fertilization coverage as required by Insurance Code Article 3.51-6, §3A;

(11) coverage of HIV, AIDS, or HIV-related illnesses as required by Insurance Code Article 3.51-6, §3C;

(12) coverage of chemical dependency and stays in a chemical dependency treatment facility as required by Insurance Code Article 3.51-9;

(13) the offer of mental or emotional illness coverage as required by Insurance Code Article 3.70-2(F);

(14) coverage of inpatient mental health and stays in a psychiatric day treatment facility as required by Insurance Code Article 3.70-2(F);

(15) the offer of speech and hearing coverage as required by Insurance Code Article 3.70-2(G);

(16) coverage of stays in a crisis stabilization unit and/or residential treatment center for children and adolescents as required by Insurance Code Article 3.72;

(17) coverage of a minimum stay for mastectomy treatment/services as required by Insurance Code Article 21.52J;

(18) continuation of coverage of certain drugs under a drug formulary as required by Insurance Code Article 21.52J;

(19) coverage of diagnosis and treatment affecting temporomandibular joint and treatment for a person unable to undergo dental treatment in an office setting or under local anesthesia as required by Insurance Code Article 21.53A;

(20) coverage of bone mass measurement for osteoporosis as required by Insurance Code Article 21.53C;

(21) coverage of diabetes care as required by Insurance Code Article 21.53D;

(22) coverage of telehealth and telemedicine as required by Insurance Code Article 21.53F;

(23) coverage of off-label drugs as required by Insurance Code Article 21.53M;

(24) offer of coverage for therapies for children with developmental delays as required by Insurance Code Article 21.53F;

(25) entitlement to care under Article 21.52B relating to pharmaceutical services; and

(26) the requirements of Article 21.52D regarding the use of optometrists and ophthalmologists by managed care plans, that exceed the entitlement to select a practitioner under Article 21.52 and Article 3.70-2.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 13, 2004.  
TRD-200403233

Gene C. Jarmon  
General Counsel and Chief Clerk  
Texas Department of Insurance  
Effective date: June 2, 2004  
Proposal publication date: January 9, 2004  
For further information, please call: (512) 463-6327



## DIVISION 3. REQUIRED NOTICES

### 28 TAC §§21.3525 - 21.3530, 21.3535

The new sections are adopted under the Insurance Code Articles 3.80, §7, 20A.09N(j), and §36.001. Articles 3.80, §7 and 20A.09N(j) require the commissioner to adopt rules as necessary to implement the statutes creating consumer choice health benefit plans. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

#### §21.3530. *Health Carrier Disclosure.*

(a) A health carrier offering or providing a consumer choice health benefit plan must provide each prospective or current policyholder or contract holder with a written disclosure statement in the manner prescribed in Form CCP 1 provided by the department for that purpose. Form CCP 1:

(1) acknowledges that the consumer choice health benefit plan being offered or purchased does not provide some or all state-mandated health benefits;

(2) lists those state-mandated health benefits not included under the consumer choice health benefit plan;

(3) provides a notice that purchase of the plan may limit future coverage options in the event the policyholder's, contract holder's, or certificate holder's health changes and needed benefits are not covered under the consumer choice health benefit plan;

(4) requires the prospective or current policyholder or contract holder to sign an acknowledgment that he received the written disclosure statement, and

(5) informs the prospective or current policyholder or contract holder that he has the right to a copy of the written disclosure statement free of charge.

(b) A health carrier may obtain Form CCP 1 by making a request to the Life and Health/Filings and Operations Division, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701, or by accessing the department website at [www.tdi.state.tx.us](http://www.tdi.state.tx.us).

(c) A health carrier must tender the disclosure described in subsection (a) of this section:

(1) to a prospective policyholder or contract holder, not later than with the offer of a consumer choice health benefit plan; and

(2) to an existing policyholder or contract holder, along with any offer to renew the contract or policy.

(d) Where a health carrier tenders the disclosure statement referenced in subsection (a) of this section to a prospective policyholder or contract holder:

(1) through an agent, the agent may not transmit the application to the health carrier for consideration until the agent has secured the signed disclosure statement from the applicant.

(2) directly to the applicant, the health carrier may not process the application until the health carrier has secured the signed disclosure statement from the applicant.

(e) The health carrier must, upon request, provide the prospective policyholder or contract holder with a copy of the written disclosure statement.

(f) Where a health carrier is offering or issuing a consumer choice health benefit plan to an association, the health carrier must satisfy the requirements of subsection (c) of this section by tendering the disclosure to prospective or existing certificate holders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 13, 2004.

TRD-200403234  
Gene C. Jarmon  
General Counsel and Chief Clerk  
Texas Department of Insurance  
Effective date: June 2, 2004  
Proposal publication date: January 9, 2004  
For further information, please call: (512) 463-6327



## DIVISION 4. ADDITIONAL REQUIREMENTS

### 28 TAC §§21.3540 - 21.3544

The new sections are adopted under the Insurance Code Articles 3.80, §7, 20A.09N(j), and §36.001. Articles 3.80, §7 and 20A.09N(j) require the commissioner to adopt rules as necessary to implement the statutes creating consumer choice health benefit plans. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

#### §21.3542. *Offer of State-Mandated Plan.*

(a) A health carrier that offers the opportunity to apply for one or more consumer choice health benefit plans under this section to a person or entity must also, no later than at the time of application, offer the opportunity to apply for an accident and sickness insurance policy or evidence of coverage in the same category that most closely approximates the consumer choice health benefit plan offered, that includes state-mandated health benefits, and that is otherwise authorized by the Insurance Code.

(b) With regard to health plans required by subsection (a) of this section, a health carrier shall:

(1) use the same sources and methods of distribution to market both consumer choice health benefit plans and health benefit plans required by this subsection;

(2) make the offer of such health plans, the premium cost of such plans, as well as any additional details regarding them, contemporaneously with and in the same manner as the offer and premium cost of, and other details regarding, the consumer choice health benefit plan policy or evidence of coverage; and

(3) provide at least the following information:

(A) a description of how the person or entity may apply for or enroll in each offered policy or evidence of coverage;

(B) the benefits and/or services available and the premium cost under each offered policy or evidence of coverage; and

(C) upon request, an explanation of each of the policies or evidences of coverage and the differences between the health plan offered pursuant to subsection (a) of this section and the consumer choice health benefit plans.

(c) A health carrier shall not apply more stringent or detailed requirements related to the application process for a consumer choice health benefit plan, or for a policy or evidence of coverage offered in compliance with subsection (a) of this section, than it applies for other health benefit plans offered by the health carrier.

(d) A health carrier offering a consumer choice health benefit plan must obtain from each prospective policyholder or contract holder, at or before the time of application, a written affirmation that the health carrier also offered a policy or evidence of coverage in compliance with subsection (a) of this section. A health carrier may combine on a single form this written affirmation and the acknowledgement of the written disclosure statement required by §21.3530(a)(4) of this subchapter (relating to Health Carrier Disclosure).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 13, 2004.

TRD-200403235

Gene C. Jarmon

General Counsel and Chief Clerk

Texas Department of Insurance

Effective date: June 2, 2004

Proposal publication date: January 9, 2004

For further information, please call: (512) 463-6327



## **TITLE 40. SOCIAL SERVICES AND ASSISTANCE**

### **PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES**

#### **CHAPTER 47. CONTRACTING TO PROVIDE PRIMARY HOME CARE**

The Texas Department of Human Services (DHS) adopts new §§47.1, 47.3, 47.5, 47.11, 47.21, 47.23, 47.25, 47.41, 47.43, 47.45, 47.47, 47.49, 47.61, 47.63, 47.65, 47.67, 47.69, 47.71, 47.73, 47.81, 47.83, 47.85, 47.87, 47.89, and 47.5902; and adopts the repeal of §§47.1901-47.1904, 47.2901-47.2905, 47.2908-47.2914, 47.3906-47.3908, 47.4902- 47.4905, 47.5902, and 47.6902.

New §§47.3, 47.41, and 47.45 are adopted with changes to the proposed text published in the February 6, 2004, issue of the *Texas Register* (29 TexReg 1169). New §§47.1, 47.5, 47.11, 47.21, 47.23, 47.25, 47.43, 47.47, 47.49, 47.61, 47.63, 47.65, 47.67, 47.69, 47.71, 47.73, 47.81, 47.83, 47.85, 47.87, 47.89, and 47.5902; and the repeals of §§47.1901-47.1904, 47.2901-47.2905, 47.2908-47.2914, 47.3906-47.3908, 47.4902- 47.4905, 47.5902, and 47.6902 are adopted without changes to the proposed text.

The new sections and repeals were undertaken as part of a DHS project to rewrite agency rules in plain English to make them easier for contractors and the public to use and understand. The addition of a rule concerning the interdisciplinary team was included to address any service delivery issues identified by the provider agency. In addition, language that duplicates licensure requirements was eliminated in order to reduce redundancy.

DHS received three written comments from the Texas Association for Home Care. A summary of the comments and DHS's responses follow.

**Comment:** Concerning §47.3(24), we suggest rewriting the definition for variable service schedules. The purpose of creating the flexible schedule was to allow for minor changes, which may routinely occur in delivering the services (the discussion began with the use of telephony). The service plan includes the service schedule as well as the total weekly hours authorized, and this is signed by the client. To force the schedule to equal authorized hours takes away the flexibility. An attendant who works a few minutes to a couple of hours per week less than the authorized hours should be able to be agreeable on the front end without the need for documentation at every instance. With your proposed language, a provider using telephony would have to document any time that the exact number of authorized hours were not delivered. This language would set us back from what had already been agreed to in policy for the flexible schedule and would make it impractical to utilize telephony.

**Response:** DHS agrees and changed the definition to read: "...A variable service schedule states the number of hours of services to be delivered per day or per week, not to exceed the authorized hours per week, and does not otherwise specify any certain days, times of day, or time periods for delivery of the services."

**Comment:** Concerning §47.3(25), we suggest adding language that initials are not an acceptable substitute for a signature "unless initials have been established as the person's official signature."

**Response:** DHS agrees and changed the section to include the requested wording.

**Comment:** Concerning §47.71(a)(4), we suggest expanding the definition of an institution to include a correctional facility, such as a prison or jail.

**Response:** DHS disagrees and did not change the section. DHS addresses this possibility in §47.71(a)(2). Primary home care, community attendant, and family care services cannot be provided in any setting or environment where other sources are available to provide care, as stated in §48.2911(b)(6) and §48.2918(b)(4).

In addition, DHS initiated a minor formatting change to the text of §47.41 and §47.45 to clarify the structure of the section.

#### **SUBCHAPTER A. INTRODUCTION**

##### **40 TAC §§47.1, 47.3, 47.5**

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

### §47.3. Definitions.

The following words, terms, and phrases have the following meanings when used in this chapter, unless the context clearly indicates otherwise:

(1) **Attendant**--An employee of a provider agency who provides the authorized tasks to the client.

(2) **Case manager**--A Texas Department of Human Services (DHS) employee who is responsible for case management activities. Activities include eligibility determination, client registration, assessment and reassessment of client's need, service plan development, and intercession on the client's behalf.

(3) **Client**--A Community Care for Aged and Disabled (CCAD) client, as defined in Chapter 48 of this title (relating to Community Care for Aged and Disabled), who is eligible to receive services under this chapter. References in this chapter to "client" include the client's representative, unless the context indicates otherwise.

(4) **Community attendant (CA) services**--A service under the Primary Home Care Program providing in-home attendant services to clients. Clients receiving CA services must have a medical need for specific tasks. CA services (formerly known as §1929(b) or frail elderly) are provided under Title XIX of the federal Social Security Act (relating to Grants to States for Medical Assistance Programs) at 42 U.S.C. §1396t (relating to Home and community care for functionally disabled elderly individuals).

(5) **Contract**--The formal, written agreement between DHS and a provider agency to provide services to DHS clients eligible under this chapter in exchange for reimbursement.

(6) **Contract manager**--A DHS employee who is responsible for the overall management of the contract with the provider agency.

(7) **Days**--Any reference to days means calendar days, unless otherwise specified in the text. Calendar days include weekends and holidays.

(8) **Family care (FC) services**--A service under the Primary Home Care Program providing in-home attendant services to eligible adults. FC services are provided under Title XX of the federal Social Security Act (relating to Block Grants to States for Social Services) at 42 U.S.C. §1397 et seq.

(9) **Imminent danger**--An immediate, real threat to a person's safety.

(10) **Medical need**--A medical diagnosis that results in a need for assistance with activities of daily living. For purposes of this chapter, activities of daily living do not include services that must be provided or supervised by licensed personnel.

(11) **Negotiated referral**--A request from the case manager to a provider agency to evaluate a person for service delivery, in which the case manager determines that the person's needs require that services begin on a particular date.

(12) **Non-priority**--One of two types of eligibility status for service delivery determined by the case manager. The other type of eligibility status for service delivery is priority. A non-priority client does not meet the criteria described in §48.2918(f) of this title (relating to Eligibility for Primary Home Care). Services delivered to such a client may be referred to as non-priority services, and an attendant who serves such a client may be referred to as a non-priority attendant.

(13) **Practitioner**--A physician currently licensed in Texas, Louisiana, Arkansas, Oklahoma or New Mexico, a physician assistant currently licensed in Texas, or a registered nurse approved by the Texas

State Board of Nurse Examiners to practice as an advanced practice nurse.

(14) **Practitioner's statement**--A document such as the DHS Practitioner's Statement of Medical Need form that includes:

(A) a statement signed by a practitioner that the client has a current medical need for assistance with personal care tasks and other activities of daily living; and

(B) certification that the provider agency verified with the United States' Centers for Medicare and Medicaid Services that the practitioner is not excluded from participation in Medicare or Medicaid.

(15) **Practitioner's statement date**--The practitioner's statement date is:

(A) the later of the following:

(i) the practitioner's signature date on the practitioner's statement; or

(ii) the date the provider agency receives the practitioner's statement. If the provider agency fails to stamp the receipt date on the form, the date of the practitioner's signature will be used to determine the practitioner's statement date; or

(B) the date of the practitioner's oral statement obtained for a negotiated referral. The provider agency must document the practitioner's oral statement date on the practitioner's written statement required in §47.47(c)(2) of this chapter (relating to Medical Need Determination).

(16) **Primary Home Care Program**--A DHS attendant care services program. Community attendant (CA), primary home care (PHC), and family care (FC) are the three types of services available under the Primary Home Care Program.

(17) **Primary home care (PHC) services**--A service under the Primary Home Care Program providing in-home attendant services to clients. Clients receiving PHC services must have a medical need for specific tasks. PHC services are provided under Title XIX of the federal Social Security Act, at 42 U.S.C. §1396a (relating to State plans for medical assistance).

(18) **Priority**--One of two types of eligibility status for service delivery determined by the case manager. The other type of eligibility status for service delivery is non-priority. A priority client meets the criteria described in §48.2918(f) of this title. Services delivered to such a client may be referred to as priority services, and an attendant who serves such a client may be referred to as a priority attendant.

(19) **Provider agency**--A home and community support services agency that contracts with DHS to provide services to clients in exchange for reimbursement.

(20) **Reckless behavior**--Acting with conscious indifference to the consequences.

(21) **Regional nurse**--A DHS employee who is responsible for authorizing a client to receive CA services.

(22) **Representative**--The client's spouse, other responsible party, or legal representative.

(23) **Routine referral**--A request from the case manager to a provider agency to evaluate a person for service delivery, in which the case manager determines that the person's needs do not require a negotiated referral.

(24) **Service schedule**--A schedule for delivering attendant services that is agreed upon and signed by the client. A fixed service

schedule specifies certain days, times of day, or time periods for delivery of the services. A variable service schedule states the number of hours of services to be delivered per day or per week, not to exceed the authorized hours per week, and does not otherwise specify any certain days, times of day, or time periods for delivery of the services.

(25) Signature--A person's name written in longhand or a mark representing his or her name on a document to certify it is correct. Initials are not an acceptable substitute for a signature, unless initials have been established as the person's official signature.

(26) Supervisor--A provider agency employee who:

(A) coordinates the delivery of services in the client's service plan;

(B) supervises attendants; and

(C) meets the requirements found in §97.404 of this title (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services).

(27) Unit of service--One hour of service delivered to a client.

(28) Working days--Days DHS is open for business.

(29) Written--Information recorded on paper or other legible document. Written information may be sent by mail or fax, or hand-delivered.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403143

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## SUBCHAPTER B. PROVIDER AGENCY CONTRACTS

### 40 TAC §47.11

The new section is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new section affects the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403144

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## SUBCHAPTER C. STAFF REQUIREMENTS

### 40 TAC §§47.21, 47.23, 47.25

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403145

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## SUBCHAPTER D. SERVICE PLAN DEVELOPMENT

### 40 TAC §§47.41, 47.43, 47.45, 47.47, 47.49

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

§47.41. Allowable Tasks.

The Primary Home Care Program includes the following tasks:

(1) Personal care tasks related to the care of the client's physical health. These tasks include:

(A) bathing, which is:

(i) drawing water in sink, basin, or tub;

(ii) hauling or heating water;

(iii) laying out supplies;

(iv) assisting in or out of tub or shower;

(v) sponge bathing and drying;

- (vi) bed bathing and drying;
- (vii) tub bathing and drying; and
- (viii) providing standby assistance for safety;
- (B) dressing, which is:
  - (i) dressing the client;
  - (ii) undressing the client; and
  - (iii) laying out clothes;
- (C) meal preparation, which is:
  - (i) cooking a full meal;
  - (ii) warming up prepared food;
  - (iii) planning meals;
  - (iv) helping prepare meals; and
  - (v) cutting client's food for eating;
- (D) feeding/eating, which is:
  - (i) spoon-feeding;
  - (ii) bottle-feeding;
  - (iii) assisting with using eating and drinking utensils and adaptive devices. This does not include tube feeding; and
  - (iv) providing standby assistance or encouragement;
- (E) exercise, which is walking with the client;
- (F) grooming/shaving/oral care, which is:
  - (i) shaving;
  - (ii) brushing teeth;
  - (iii) shaving underarms and legs, when requested;
  - (iv) caring for nails; and
  - (v) laying out supplies;
- (G) routine hair/skin care, which is:
  - (i) washing hair;
  - (ii) drying hair;
  - (iii) assisting with setting, rolling, or braiding hair. This does not include styling, cutting, or chemical processing of hair;
  - (iv) combing or brushing hair;
  - (v) applying nonprescription lotion to skin;
  - (vi) washing hands and face;
  - (vii) applying makeup; and
  - (viii) laying out supplies;
- (H) assistance with self-administered medications. This means assistance with medication as defined in §97.2(10) of this title (relating to Definitions);
- (I) toileting, which is:
  - (i) changing diapers;
  - (ii) changing colostomy bag or emptying catheter bag;
  - (iii) assisting on or off bedpan;
  - (iv) assisting with the use of a urinal;

- (v) assisting with feminine hygiene needs;
- (vi) assisting with clothing during toileting;
- (vii) assisting with toilet hygiene, including the use of toilet paper and washing hands;
- (viii) changing external catheter;
- (ix) preparing toileting supplies and equipment. This does not include preparing catheter equipment; and
- (x) providing standby assistance; and
- (J) transfer/ambulation, which is:
  - (i) non-ambulatory movement from one stationary position to another (transfer). This does not include carrying;
  - (ii) adjusting or changing the client's position in a bed or chair (positioning);
  - (iii) assisting in rising from a sitting to a standing position;
  - (iv) assisting in positioning for use of a walking apparatus;
  - (v) assisting with putting on and removing leg braces and prostheses for ambulation;
  - (vi) assisting with ambulation or using steps;
  - (vii) assisting with wheelchair ambulation; and
  - (viii) providing standby assistance.
- (2) Home management tasks that support the client's health and safety. These tasks include:
  - (A) cleaning, which is:
    - (i) cleaning up after the client's personal care tasks;
    - (ii) emptying and cleaning the client's bedside commode;
    - (iii) cleaning the client's bathroom;
    - (iv) changing the client's bed linens and making the client's bed;
    - (v) cleaning floor of living areas used by client;
    - (vi) dusting areas used by client;
    - (vii) carrying out the trash and setting out garbage for pick up;
    - (viii) cleaning stovetop and counters;
    - (ix) washing the client's dishes; and
    - (x) cleaning refrigerator and stove;
  - (B) laundry, which is:
    - (i) doing hand wash;
    - (ii) gathering and sorting;
    - (iii) loading and unloading machines in residence;
    - (iv) using Laundromat machines;
    - (v) hanging clothes to dry;
    - (vi) folding and putting away clothes; and
  - (C) shopping, which is:
    - (i) preparing a shopping list;

items;

- (ii) going to the store and purchasing or picking up items;
- (iii) picking up medication; and
- (iv) storing the client's purchased items.

(3) Escort. Escort includes the following:

(A) accompanying the client outside the home to support the client in living in the community;

(B) arranging for transportation. The provider agency may also choose to directly provide transportation; however, direct client transportation is not reimbursed under the Primary Home Care Program;

(C) accompanying the client to a clinic, doctor's office, or location for medical diagnosis or treatment; and

(D) waiting in the doctor's office or clinic with a client when necessary due to client's condition or distance from home.

*§47.45. Pre-Initiation Activities.*

(a) Pre-initiation activities. The supervisor must complete the following activities for each referral:

(1) Conduct an evaluation.

(A) The evaluation must be a single document that includes the person's self-report of:

(i) the dates and reasons for any hospitalization within the last three months; and

(ii) the assistance needed for the person to achieve activities of daily living, including any assistive devices or medical equipment used by the person.

(B) If the provider agency determines during the evaluation that the client exhibits reckless behavior that results in imminent danger to the health and safety of the client, the provider agency must convene an Interdisciplinary Team meeting as described in §47.49 of this chapter (relating to Interdisciplinary Team) to discuss the barriers to service delivery.

(2) Develop a service plan. The service plan must be a single document that:

(A) is agreed upon and signed by the client and the provider agency;

(B) indicates the location of service delivery. The provider agency must:

(i) make a reasonable effort to deliver services at a location outside the client's home, if requested by the client; and

(ii) maintain written justification if the client's request was not granted; and

(C) includes the following:

(i) the tasks the client will receive.

(I) The provider agency must ensure that at least one personal care task is authorized by the Texas Department of Human Services (DHS), scheduled, and provided.

(II) Recipients of family care services are not required to receive any personal care tasks.

(III) The provider agency must ensure the tasks the client will receive do not duplicate any services received from any other source;

(ii) the total weekly hours of service DHS authorizes the client to receive;

(iii) the service schedule;

(iv) frequency of supervisory visits; and

(v) a statement that:

(I) the Primary Home Care Program only provides the tasks allowable in the program as described in §47.41 of this chapter (relating to Allowable Tasks) and agreed to on the service plan; and

(II) the provider agency is not responsible for meeting the applicant's needs other than tasks allowed under the Primary Home Care Program.

(3) Obtain a practitioner's statement as described in §47.47 of this chapter (relating to Medical Need Determination). This paragraph does not apply to family care services.

(b) Service plan differences.

(1) The provider agency must orally notify the case manager when the initial service plan developed by the provider agency:

(A) has more hours than authorized on DHS's Authorization for Community Care Services form; or

(B) has no personal care tasks. This subparagraph does not apply to family care services.

(2) The provider agency must discuss the difference in the service plan with the case manager.

(3) The provider agency must provide services according to the existing service plan, until the provider agency receives a new DHS Authorization for Community Care Services form.

(4) The provider agency must maintain the following documentation regarding the service plan difference in the client file:

(A) the specific difference in the service plan; and

(B) the decision regarding the difference.

(c) Pre-initiation activities due date. The provider agency must complete the pre-initiation activities as follows:

(1) for routine referrals, within 14 days after one of the following dates, whichever is later:

(A) the referral date (Item 1) on DHS's Authorization for Community Care Services form; or

(B) the date the provider agency receives DHS's Authorization for Community Care Services form. If the provider agency fails to stamp the receipt date on the form, the referral date (Item 1) will be used to determine timeliness; and

(2) for negotiated referrals, by the service initiation date negotiated with the case manager.

(d) Delay in pre-initiation activities.

(1) The provider agency must document any failure to complete the pre-initiation activities for routine referrals by the due date, including:

(A) the reason for the delay, which must be beyond the control of the provider agency;

(B) either the date the provider agency anticipates it will complete the pre-initiation activities or specific reasons why the provider agency cannot anticipate a completion date; and



(C) a description of the provider agency's ongoing efforts to complete pre-initiation activities.

(2) The provider agency must orally notify the case manager of any failure to complete the pre-initiation activities for negotiated referrals before the negotiated service initiation date. Oral notice means directly speaking with the case manager and does not include a message left by voice mail. The case manager may refer the client to another provider agency.

(e) Documentation of pre-initiation activities.

(1) The provider agency may combine the evaluation and service plan into a single document, but each item must be clearly identifiable.

(2) The provider agency must maintain documentation of the pre-initiation activities in the client file.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403146

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## SUBCHAPTER E. SERVICE REQUIREMENTS

### 40 TAC §§47.61, 47.63, 47.65, 47.67, 47.69, 47.71, 47.73

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403147

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## SUBCHAPTER F. CLAIMS PAYMENT AND DOCUMENTATION

### 40 TAC §§47.81, 47.83, 47.85, 47.87, 47.89, 47.5902

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403148

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## CHAPTER 47. PRIMARY HOME CARE SUBCHAPTER A. GENERAL PROVISIONS AND SERVICES

### 40 TAC §§47.1901 - 47.1904

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403149

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734



## SUBCHAPTER B. SERVICE REQUIREMENTS

### 40 TAC §§47.2901 - 47.2905, 47.2908 - 47.2914

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001-22.040 and §§32.001- 32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403150

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734

◆ ◆ ◆

## SUBCHAPTER C. CLAIMS PAYMENT

### 40 TAC §§47.3906 - 47.3908

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001-22.040 and §§32.001- 32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403151

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734

◆ ◆ ◆

## SUBCHAPTER D. PROVIDER CONTRACTS

### 40 TAC §§47.4902 - 47.4905

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001-22.040 and §§32.001- 32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403152

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734

◆ ◆ ◆

## SUBCHAPTER E. SUPPORT DOCUMENTS

### 40 TAC §47.5902

The repeal is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal affects the Human Resources Code, §§22.0001-22.040 and §§32.001- 32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403153

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734

◆ ◆ ◆

## SUBCHAPTER F. SANCTIONS

### 40 TAC §47.6902

The repeal is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal affects the Human Resources Code, §§22.0001-22.040 and §§32.001- 32.067.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2004.

TRD-200403154

Carey Smith

Deputy Commissioner, Legal Services

Texas Department of Human Services

Effective date: June 1, 2004

Proposal publication date: February 6, 2004

For further information, please call: (512) 438-3734

◆ ◆ ◆

# REVIEW OF AGENCY RULES

notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (<http://www.sos.state.tx.us/texreg>). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative Code* on the web site (<http://www.sos.state.tx.us/tac>).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

## Proposed Rule Reviews

Texas Workers' Compensation Commission

### Title 28, Part 2

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 147, concerning Dispute Resolution--Agreements, Settlements, Commutations. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by Senate Bill 178, 76th Legislature.

- §147.1. Definitions.
- §147.2. Form.
- §147.3. Execution.
- §147.4. Filing Agreements with the Commission; Effective Dates.
- §147.5. Filing Settlements with the Commission; Effective Dates.
- §147.6. Settlement Conference.
- §147.7. Effect on Previously Entered Decisions and Orders.
- §147.8. Withdrawal from Settlement.
- §147.9. Requirements for Agreements and Settlements.
- §147.10. Commutation of Impairment Income Benefits.
- §147.11. Notification of Commission of Proposed Judgments and Settlements.

The agency's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt these rules. Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on June 21, 2004 and submitted to Linda Velásquez, Legal Services, Office of General Counsel, MS 4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1609.

TRD-200403141  
Susan Cory  
General Counsel  
Texas Workers' Compensation Commission  
Filed: May 10, 2004

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 152, concerning Attorneys' Fees. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review*; (2)

Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by Senate Bill 178, 76th Legislature.

- §152.1. Attorney Fees: General Provisions.
- §152.2. Attorney Fees: Representation of Claimants.
- §152.3. Approval or Denial of Fee by the Commission.
- §152.4. Guidelines for Legal Services Provided to Claimants and Carriers.
- §152.5. Allowable Expenses.

The agency's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt these rules. Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on June 21, 2004 and submitted to Linda Velásquez, Legal Services, Office of General Counsel, MS 4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1609.

TRD-200403142  
Susan Cory  
General Counsel  
Texas Workers' Compensation Commission  
Filed: May 10, 2004

## Adopted Rule Review

Texas Department of Licensing and Regulation

### Title 16, Part 4

In accordance with the proposed rule review published in the February 6, 2004 issue of the *Texas Register* (29 TexReg 1231) and the requirements of Texas Government Code, §2001.039, the Texas Department of Licensing and Regulation (Department) has conducted a review of all rule sections in 16 TAC Chapter 60, Texas Commission of Licensing and Regulation and readopts 16 TAC, Chapter 60, Texas Commission of Licensing and Regulation administrative rules with changes.

The Department conducted a thorough review of Chapter 60 to determine whether the rules were obsolete, whether the rules reflected current legal and policy considerations, and whether the rules reflected current procedures of the Department. As part of the review process and in conjunction with changes made as a result of the 78th Legislative Session rule amendments were proposed and published in the February 6, 2004 issue of the *Texas Register* (29 TexReg 1127) and the February 20, 2004 issue of the *Texas Register* (29 TexReg 1494) in accordance with requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The comment period closed on March 6, 2004. No public comments were received.

The Department has determined that the rules, as amended, are essential in accomplishing the provisions of Texas Occupations Code, Chapter 51. The rules are readopted with changes in accordance with Texas Government Code, §2001.039.

TRD-200403212

William H. Kuntz, Jr.  
Executive Director  
Texas Department of Licensing and Regulation  
Filed: May 12, 2004

◆ ◆ ◆

# TABLES & GRAPHICS

---

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word “Figure” followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

---

Figure: 4 TAC §19.300(a)

<b>Common Name</b>	<b>Botanical Name</b>
alligatorweed	<i>Alternanthera philoxeroides</i>
balloonvine	<i>Cardiospermum halicacabum</i>
Brazilian peppertree	<i>Schinus terebinthifolius</i>
broomrape	<i>Orobanche ramosa</i>
camelthorn	<i>Alhagi camelorum</i>
Chinese tallow tree	<i>Sapium sebiferum</i>
Eurasian watermilfoil	<i>Myriophyllum spicatum</i>
giant duckweed	<i>Spirodela oligorrhiza</i>
giant reed	<i>Arundo donax</i>
hedge bindweed	<i>Calystegia sepium</i>
hydrilla	<i>Hydrilla verticillata</i>
itchgrass	<i>Rottboellia cochinchinensis</i>
Japanese dodder	<i>Cuscuta japonica</i>
kudzu	<i>Pueraria lobata</i>
lagarosiphon	<i>Lagarosiphon major</i>
paperbark	<i>Melaleuca quinquenervia</i>
purple loosestrife	<i>Lythrum salicaria</i>
rooted waterhyacinth	<i>Eichhornia azurea</i>
saltcedar	<i>Tamarix spp.</i>
salvinia	<i>Salvinia spp.</i>
serrated tussock	<i>Nassella trichotoma</i>
torpedograss	<i>Panicum repens</i>
tropical soda apple	<i>Solanum viarum</i>
water spinach	<i>Ipomoea aquatica</i>
waterhyacinth	<i>Eichhornia crassipes</i>
waterlettuce	<i>Pistia stratiotes</i>

# IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

## Texas Agriculture Resources Protection Authority

### Notice of Hearing

In accordance with the Texas Agriculture Code, §76.009(i) and policies adopted by the Agriculture Resources Protection Authority (the Authority), notice is hereby provided that the Authority will take public comment on the status of the state's pesticide regulation efforts at its next regularly scheduled meeting. The meeting will be held on Monday, June 7, 2004, beginning at 10:00 a.m. at the offices of the Texas Department of Agriculture located at 1700 North Congress, Room 1003A (RED Conference Room), Austin, Texas. For more information, please contact Phil Tham at (512) 463-1093.

TRD-200403198

Dolores Alvarado Hibbs

Deputy General Counsel, Texas Department of Agriculture

Texas Agriculture Resources Protection Authority

Filed: May 12, 2004

## Coastal Coordination Council

### Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of April 30, 2004, through May 6, 2004. The public comment period for these projects will close at 5:00 p.m. on June 11, 2004.

#### FEDERAL AGENCY ACTIONS:

**Applicant: Lower Colorado River Authority;** Location: The project is located along the Colorado River, on a 1,600-acre tract situated west and east of FM 2031, beginning approximately 5 miles south of the town of Matagorda and extending to the Gulf of Mexico in Matagorda County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Matagorda SW, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 208861; Northing: 3167357. Project Description: The applicant proposes to fill 0.92-acre of wetlands during the construction of a new beach access road. The applicant also proposes to place 68 cubic yards of fill below the mean high water line during the construction of a bulkhead, two fishing piers, a boat dock, and a wastewater outfall structure for the LCRA Matagorda Bay Nature Park located along the Colorado River. The public beach access road would extend from an existing road east-southeast to the beach, a

distance of 4,200 feet. The two fishing piers would measure eight feet wide and forty feet long (320 square feet). The boat dock would measure eight feet wide and fifty feet long (450 square feet). Both of the fishing piers and the boat dock would connect to the bank via 6.5-foot wide and 30-foot long walkways (195 square feet each). A 20-foot long bulkhead would be constructed just north of the proposed boat dock. The outfall structure would release treated wastewater into the Colorado River channel. The purpose of the proposed beach access road is to establish a permanent point of public vehicular access to the beach while allowing for one-half mile of pedestrian-only beach east of the existing Jetty Park facility. The proposed fishing piers would be open to the public and would be used by the LCRA during educational programs. The proposed boat dock would be used by LCRA and others for educational and recreational programs. The proposed bulkhead would be used by the property owner west of the Colorado River channel to dock a barge used for transporting equipment and vehicles to their land. The proposed wastewater outfall structure would be the discharge point for the proposed central wastewater treatment system for the Matagorda Bay Nature Park facilities and the existing subdivisions adjacent to the park. A jurisdictional delineation (D-13328/(03)) has been submitted to the Corps for verification. CCC Project No.: 04-0162-F1; Type of Application: U.S.A.C.E. permit application #23354 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A §1251-1387). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

**Applicant: Kahala Development, LLC;** Location: The project is located adjacent to the Gulf of Mexico in coastal dune swale freshwater wetlands, between 8 Mile Road and Beach Pocket Park Number 2 in Galveston, Galveston County, Texas. The project and mitigation sites can be located on the U.S.G.S. quadrangle map entitled: Lake Como, Texas. Approximate UTM Coordinates in NAD 27 for the project site are: Zone 15; Easting: 316507; Northing: 3235193; mitigation site: Zone 15; Easting: 315867; Northing: 3235325. Project Description: The applicant proposes to place 43,500 cubic yards of clean fill into approximately 21.53 acres of the approximately 24.12 acres of adjacent jurisdictional freshwater wetlands existing on site for the purpose of constructing residential housing lots. The fill material will be obtained onsite and/or from native sources near the site (north and adjacent to FM 3005). The fill will be obtained from upland areas. The project site consists of Phase 1 and Phase 2. A wetland delineation has been submitted and verified by the Corps of Engineers for Phase 1 of the project (D-14079(03)). Currently, construction is ongoing in the uplands of Phase 1 of the project site. Total verified adjacent freshwater wetland acreage for Phase 1 is 6.978 acres. Under this permit application, the applicant proposes to fill 5.274 acres and avoid 1.704 acres in Phase 1. Currently, the avoided freshwater wetlands are being protected via silt fence and other appropriate sediment controls. However, even though the applicant has avoided the wetlands, the quality of the avoided wetlands has deteriorated significantly due to the surrounding residential infrastructure being constructed around the wetlands. A wetland delineation has not been submitted for Phase 2 of the project. Phase 2 of the project proposes to impact approximately 16.256 acres of the total 17.144 acres of wetlands existing onsite. The applicant proposes to avoid approximately 0.888 acres of wetlands in Phase 2. As mitigation

the applicant proposes one of three possible plans. The proposed site is located on a 53 acre tract north of FM 3005 and south of Stewart Road. The proposed mitigation site appears to contain a mixture of upland, grassland and palustrine emergent wetland based on aerial photos. Approximately 11.5 acres of wetlands currently exist on the tract although exact wetland boundaries still need to be delineated on the site. The applicant has proposed three different concepts for comment. Concept Plan 1 would result in the creation of 24 acres of freshwater wetlands; Concept Plan 2 would result in the creation of 25-30 acres of freshwater wetlands; and Concept 3 would result in the creation of approximately 25 acres of freshwater wetlands. All concepts would include a grassland fringe and uplands. CCC Project No.: 04-0163-F1; Type of Application: U.S.A.C.E. permit application #23282 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A §1251-1387). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or [diane.garcia@glo.state.tx.us](mailto:diane.garcia@glo.state.tx.us). Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200403199

Larry L. Laine

Chief Clerk/Deputy Land Commissioner, General Land Office

Coastal Coordination Council

Filed: May 12, 2004

## Office of Consumer Credit Commissioner

### Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 05/17/04 -- 05/23/04 is 18% for Consumer<sup>1</sup>/Agricultural/Commercial<sup>2</sup>/credit thru \$250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 05/17/04 -- 05/23/04 is 18% for Commercial over \$250,000.

<sup>1</sup>Credit for personal, family or household use.

<sup>2</sup>Credit for business, commercial, investment or other similar purpose.

TRD-200403183

Leslie L. Pettijohn

Commissioner

Office of Consumer Credit Commissioner

Filed: May 11, 2004

## Deep East Texas Local Workforce Development Board

### Request for Proposals

Workforce Solutions--Deep East Texas is seeking qualified entities to enter into a contract to provide the following services on an individual referral basis for the period July 1, 2004 through June 30, 2005.

Occupational skills training for persons funded under the Workforce Investment Act Youth program, Welfare-to-Work program, and Temporary Assistance to Needy Families program. Occupational skills training is education/training of generally two years or less in a program that leads to a degree, certification, or licensure that prepares an individual to enter employment in an occupation on the targeted occupation list for Deep East Texas.

Intensive services for persons funded under the Workforce Investment Act (WIA), Welfare-to-Work (WtW) program, and Temporary Assistance to Needy Families (TANF) program. Intensive services are those programs or courses lasting six months or less, not leading to a degree, certification, or licensure, that prepare an individual to enter/re-enter employment or training. Examples of intensive services are English-as-a-Second-Language, GED preparation, basic skills/literacy, tutoring, and computer literacy. (Note: If any of these services are provided in conjunction with occupational skills, they are not intensive services but are classified as training and a separate Training Provider application must be submitted).

Qualified programs/services are those offered to the general public at a specified cost. Eligible entities include secondary and post-secondary education agencies; adult, literacy and continuing education providers; for-profit and not-for-profit providers; and community-based and charitable/faith-based organizations. Interested parties must submit a completed Request for Information form and meet minimum criteria for service providers set by the Board.

A Request for Information can be obtained by contacting:

Chris Gaston

Procurement/Contract Manager

Workforce Solutions--Deep East Texas

1318 S. John Redditt, Suite C

Lufkin, Texas 75904

Phone: (936) 639-8898

Fax: (936) 633-7491

E-mail: [chris.gaston@twc.state.tx.us](mailto:chris.gaston@twc.state.tx.us)

TRD-200403068

Chris Gaston

Procurement/Contract Manager

Deep East Texas Local Workforce Development Board

Filed: May 5, 2004

## East Texas Council of Governments

### Notice for Request for Qualifications for Policy Board Training in Fiduciary Responsibilities

This Request for Qualifications to interested entities is filed under Government Code Chapter 2254.

Notice is given that as the administrative unit for the East Texas Workforce Development Board, the East Texas Council of Governments (ETCOG) is soliciting information, in the form of this Request for Qualifications (RFQ), for the provision of policy board training on fiduciary responsibilities.



The East Texas Workforce Development Board is responsible for the oversight of state and federally funded training, employment, and childcare services in a fourteen county area around Longview and Tyler.

It is anticipated services rendered will take place over a two-day period in September or October 2004. One day consisting of training focused on the fiduciary responsibilities of local workforce development boards. Attendees shall consist of members of the East Texas Workforce Development Board and their staff. A second day of training shall be provided to community leaders who serve on various non-profit policy boards in East Texas with emphasis on the fiduciary responsibilities of policy boards in general.

Persons or organizations wanting to receive a Request for Qualifications document should inquire by letter, fax, or e-mail to East Texas Council of Governments, 3800 Stone Road, Kilgore, Texas 75662, Attention: Daniel Pippin. The fax number for ETCOG is (903) 983-1440. The e-mail address is Daniel.Pippin@twc.state.tx.us. Questions regarding the RFQ process can be addressed by calling (903) 984-8641.

If you wish to respond, the due date for this RFQ is June 29, 2004.

TRD-200403093

Glynn Knight

Executive Director

East Texas Council of Governments

Filed: May 7, 2004

## Texas Education Agency

### Request for Applications Concerning Technology Immersion Pilot (TIP), Round Two

**Eligible Applicants.** High-need local education agencies (LEAs) or eligible local partnerships are eligible to apply for the Technology Immersion Pilot (TIP) grants under Request for Applications (RFA) #701-04-033. A high-need LEA is defined as: an LEA serving at least 2,500 students from families with incomes below the poverty line as identified by 1999 census data OR serving more than 27% of children from families with incomes below the poverty line as identified by 1999 census data, AND serving at least one school identified under Title I as in need of improvement or corrective action OR having a substantial need for assistance in acquiring and using technology as reflected on the Texas Campus STaR Chart. An eligible partnership must include at least one high-need LEA and at least one of the following: (1) an LEA that can demonstrate that teachers are effectively integrating technology and proven teaching practices into instruction, based on a review of relevant research, and that the integration results in improvement in classroom instruction in the core academic subjects and the preparation of students to meet challenging state academic content and student academic achievement standards; (2) an institution of higher education that is in full compliance with the reporting requirements of the Higher Education Act of 1965, §207(f), as amended, and that has not been identified by the state as low performing under that act; (3) a for-profit business or organization that develops, designs, manufactures, or produces technology products or services or has substantial expertise in the application of technology in instruction; or (4) a public or private nonprofit organization with demonstrated expertise in the application of educational technology in instruction. The partnership may also include other LEAs, education service centers (ESCs), libraries, or other educational entities appropriate to provide local programs. If an eligible local partnership applies, a public school district, open-enrollment charter school, or ESC must serve as the fiscal agent of the partnership. Applicants who submitted an application for TIP under RFA

#701-04-009 but were not selected for funding may submit an application under this RFA.

**Description.** TIP is a federally funded grant program that will leverage the state technology immersion pilot authorized by Senate Bill 396, 78th Texas Legislature, 2003. TIP seeks to increase student achievement by providing each student with a wireless mobile computing device, software, and online and other learning resources. Through these grants, the Texas Education Agency (TEA) will evaluate and test the effectiveness of technology immersion in increasing student achievement in core academic subjects, technology proficiency, attitudes and attendance, as well as the effect on the school environment, personnel, and parent and community partnerships. Middle schools will be selected to participate in an independent evaluation to determine the effectiveness of the project. LEAs may apply for funding under the TIP only for one or more middle schools serving only Grades 6, 7, and 8.

**Dates of Project.** Applicants should plan for a starting date of no earlier than August 15, 2004, and an ending date of no later than June 30, 2006, for the project.

**Project Amount.** It is anticipated that funding will be provided for approximately 30 projects, in amounts ranging from \$25,000 to \$750,000. This project is funded 100% from the Elementary and Secondary Education Act, Title II, Part D.

**Selection Criteria.** Applications will be funded based on the assessment of each applicant's ability to carry out all requirements contained in the RFA. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the applications those that address all requirements in the RFA and that are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

**Requesting the Application.** A complete copy of RFA #701-04-033 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will be posted on the TEA website at <http://www.tea.state.tx.us/opge/disc> for viewing and downloading.

**Further Information.** For clarifying information about the RFA, contact Tammy Buckner, Texas Education Agency, (512) 475-3255, or send email to tip@tea.state.tx.us.

**Deadline for Receipt of Applications.** Applications must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Tuesday, June 22, 2004, to be considered for funding.

TRD-200403221

Cristina De La Fuente-Valadez

Director, Policy Coordination Division

Texas Education Agency

Filed: May 12, 2004

### Request for Applications Concerning Texas Head Start - Ready to Read Educational Component Grant

**Eligible Applicants.** The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-04-028 from Head Start organizations or other similar government-funded early childhood care and education programs. A Head Start Program is defined as the federal program established under the Head Start Act, 42 United States Code, 9831 et. seq., and its subsequent amendments. Eligible applicants include public school districts, open-enrollment charter schools, education service centers serving as fiscal agents, universities, colleges, and non-profit and for-profit organizations that currently operate a government-funded Head Start or similar early childhood care and education program. Applicants must serve at least 75% low income children. Eligible applicants will be required to identify, on a one-to-one basis, other eligible classrooms to be served in the second year of the grant. Second year participating classrooms will serve as the control group for evaluation of first year classrooms. In the second year of the grant, not only will the first year classrooms continue to receive services, but the control group classrooms will become full participants in all aspects of the program as well. Applicants should plan their programs and budgets for a two year program in which the number of participating classrooms doubles in the second year. Grants must include, for the two year program, a minimum of 10 and a maximum of 30 classrooms.

Participants in the Texas Early Education Model grant and prior Head Start- Ready to Read grants, including 2002-2004 grants ending on August 31, 2004, are eligible to apply to expand the program into classrooms or facilities that did not receive services under these programs. Previously served classrooms may not be included in this application. Recently awarded grantees whose programs have a start date of March 15, 2004, are not eligible to apply under any circumstance.

**Description.** The goals of this program include: (1) providing an enhanced educational component to an existing Head Start or similar government-funded early child care and education program so that every child completing the program is prepared to enter school ready to learn; (2) promoting readiness for kindergarten by providing a significant literacy and language development component to existing early education and childcare programs; and (3) identifying cost effective models for pre-reading intervention. The Texas Head Start- Ready to Read Educational Component Grant is a pre-school extension of the Texas Reading Initiative.

**Dates of Project.** The Texas Head Start- Ready to Read Educational Component Grant will be implemented during the 2004-2005 and the 2005-2006 school years. Applicants should plan for a starting date of no earlier than September 1, 2004, and an ending date of no later than August 31, 2006.

**Project Amount.** A total of approximately \$7.5 million is available for the funding of approximately 10 sites. The grant request per applicant must be a minimum of \$500,000 and a maximum of \$750,000.

**Selection Criteria.** Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The grant requires early education programs to provide scientific, research-based, pre-reading instruction so that every child completing the program is prepared to enter school ready to learn. Special consideration will be given to applicants who agree to impart, to teachers and staff of other day care and early childcare facilities in their area, the knowledge gained as a result of this grant. TEA will not award a grant to an application receiving an average score below 70. The TEA reserves

the right to select from the highest-ranking applications those that address all requirements in the RFA and that are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

**Requesting the Application.** A complete copy of RFA #701-04-028 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at <http://www.tea.state.tx.us/opge/disc> for viewing and downloading.

**Further Information.** For clarifying information about the RFA, contact Arnold Alaniz, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269.

**Deadline for Receipt of Applications.** Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Thursday, June 24, 2004, to be considered for funding.

TRD-200403220

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Filed: May 12, 2004

## **Texas Commission on Environmental Quality**

### **Notice of Availability of the Draft Restoration Plan and Environmental Assessment and Federal Consistency Determination with Coastal Management Plan**

**AGENCIES:** Texas Commission on Environmental Quality (TCEQ or commission), Texas Parks and Wildlife Department (TPWD), Texas General Land Office (GLO), United States Department of the Interior (DOI), and National Oceanic and Atmospheric Administration (NOAA) (collectively the trustees).

**ACTION:** Notice of availability of a Draft Restoration Plan and Environmental Assessment (Draft RP/EA) for natural resource injuries and ecological service losses associated with the Old Gulf Oil Refinery Site (the Site) in Port Arthur, Jefferson County, Texas, the Federal Consistency Determination for this plan under the Texas Coastal Management Program (CMP), and a 30-day public comment period on the Draft RP/EA and the Federal Consistency Determination beginning May 21, 2004.

**SUMMARY:** Notice is hereby given that the Draft RP/EA for the Site and the Federal Consistency Determination with the CMP related to the activities outlined in the Draft RP/EA are available for public review and comment.

The Draft RP/EA has been prepared by the state and federal natural resource trustees to address natural resource injuries and resource service losses of an ecological nature resulting from releases of hazardous substances to areas at or adjacent to the Site. The Draft RP/EA presents the trustees' assessment of the natural resource injuries and ecological service losses in areas at or adjacent to the Site and their proposed plan to compensate for those losses by restoring ecological resources

and services. The trustees will consider comments received during the public comment period before finalizing the RP/EA for these ecological losses.

The Federal Consistency Determination for this Draft RP/EA outlines the basis for NOAA and DOI's determination that the restoration actions described in the Draft RP/EA are consistent to the maximum extent possible, and will be undertaken in a manner consistent with the applicable policies of the CMP. Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the goals and policies of the CMP identified in 31 Texas Administrative Code (TAC) Chapter 501. Under 31 TAC §506.20(c), a determination of consistency with the CMP must be made by the federal trustees for natural resource damage assessment and restoration plans that are the product of a joint cooperative natural resource damage assessment by state and federal trustees. Review of the Federal Consistency Determination is delegated to the state trustee agencies (TCEQ, TPWD, and GLO). The state trustees will consider all comments received during the public comment period in their evaluation of the Federal Consistency Determination for the Draft RP/EA and will, depending on the comments received, submit a letter of concurrence to the federal trustees.

To receive a copy of the Draft RP/EA and/or the Federal Consistency Determination with the CMP, interested members of the public are invited to contact Richard Seiler, Texas Commission on Environmental Quality, Remediation Division, MC 225, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-2523 or fax (512) 239-4814.

**DATES:** Comments must be submitted in writing on or before June 21, 2004, to Richard Seiler, Texas Commission on Environmental Quality, Remediation Division, MC 225, P.O. Box 13087, Austin, Texas 78711-3087. The trustees will consider all written comments prior to finalizing the RP/EA and completing their review of the Federal Consistency Determination.

**AUTHORITY:** The opportunity for public review and comment on the Draft RP/EA is required under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 United States Code (USC) §9622(i), and parallels the provisions included in 43 Code of Federal Regulations (CFR) §11.32(c) of the federal natural resource damage assessment regulations.

**SUPPLEMENTARY INFORMATION:** The Site is located in Port Arthur, Jefferson County, Texas and encompasses releases of hazardous substances from the Premcor Port Arthur Refinery Site (the Old Gulf Oil Refinery Site). The Gulf Oil Company built and began operating a refinery at this site around 1902 to refine Spindletop crude oil. In 1984, Chevron acquired Gulf Oil Corporation. Premcor Refining Group, Inc. purchased the refinery in 1995 from Chevron and today it refines approximately 250,000 barrels per day of crude oil.

In a 1997 Agreed Order (Docket Number 970404IHWE; SWR Number 30004) with Chevron, the commission identified numerous solid waste management units (SWMUs) for remedial investigation. The Agreed Order consists of 12 ordering provisions and five attachments that stipulate how and when remedial investigations are to be completed.

Chevron began remediation efforts and voluntarily began to implement source control, *in-situ* stabilization and capping of identified wastes, excavation, etc., to address potential site-related human health and ecological risks. Prior to the Agreed Order, Chevron had implemented remedial actions at the Site. Chevron is expected to have completed all on-site corrective action (remedial) construction activities by August 2005. The final remedy also included consolidating waste, performing grading and capping within the Site's waste areas, installing controls to manage and treat storm water run-off from inactive and completed areas, making adjustments to dike elevations and slopes necessary to construct caps, and monitoring to prevent areas of excessive settlement

and protect against future erosion. As planned and when implemented, the remedy selected to address the contamination at the Site is expected to protect natural resources in the vicinity of the Site from further or future injury.

Paralleling TCEQ's remedial investigations at the Site, the trustees evaluated natural resource injuries and ecological service losses resulting from releases of hazardous substances to areas at or adjacent to the Site. The trustees' evaluation focused on natural resource injuries or service losses of an ecological nature caused by hazardous substances at the Site based on known contamination and anticipated remedial actions. The trustees identified polynuclear aromatic hydrocarbons, lead, zinc, nickel, chromium, and copper as contaminants of concern due to exceedances of designated criteria in the surface water and sediments of habitats in areas at or adjacent to the Site. The trustees then determined the total acreage of habitats impacted by the contaminants exceeding these criteria.

The Draft RP/EA identifies the information and methods being used to define the natural resource injuries and lost ecological services, including the scale of restoration actions, and identifies the restoration actions that are preferred to restore, replace, or acquire resources or services equivalent to those lost.

For further information, contact Richard Seiler at (512) 239-2523 or email [rseiler@tceq.state.tx.us](mailto:rseiler@tceq.state.tx.us).

TRD-200403197

Paul Sarahan

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: May 12, 2004

◆ ◆ ◆

### Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 14, 2004**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 14, 2004**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239- 2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: AEP Texas North Company; DOCKET NUMBER: 2003-1110-IHW-E; IDENTIFIER: Industrial and Hazardous Waste Facility Identification Numbers 31878 and 31872; LOCATION: San Angelo, Tom Green County, and near Girvin, Crockett County, Texas; TYPE OF FACILITY: two power plants; RULE VIOLATED: 30 TAC §§331.7(c), 335.2(a), and 335.4, by failing to obtain a permit prior to discharging industrial solid waste into a septic system at the San Angelo facility; 30 TAC §§331.133(a), 331.136, and 335.8, by failing to properly close a septic system at the San Angelo facility; and 30 TAC §335.4, by failing to prevent the unauthorized discharge of solid waste at the Rio Pecos facility; PENALTY: \$6,700; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 622 South Oaks, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(2) COMPANY: Air Liquide America Corporation; DOCKET NUMBER: 2003-0040-AIR-E; IDENTIFIER: Air Account Number BL-0626-U; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: industrial gas processing; RULE VIOLATED: 30 TAC §111.111(a)(4)(A)(ii) and THSC, §382.085(b), by failing to log a daily observation as to whether or not the flare was smoking; 30 TAC §101.20(3) and §116.115(c) and Permit Number 32274/PSD-TX-995, by failing to maintain and properly calibrate the continuous emissions monitoring system (CEMS) for the steam methane reformer (SMR) and the auxiliary boiler, and failing to install a continuous flow monitor and analyzer that provides a record of the vent stream flow and heating value to the flare; 30 TAC §101.20(1) and (3) and Code of Federal Regulations (CFR) §60.49b(i), by failing to submit semi-annual periodic reports from May 1, 1998 - May 1, 2002, and failing to conduct quality assurance tests for the SMR CEMS and the auxiliary boiler CEMS; and 40 CFR §60.18 and Agreed Order Docket Number 2000-0565-AIR-E, by failing to demonstrate that the flare meets the specifications of minimum heating value and maximum tip velocity; PENALTY: \$41,310; ENFORCEMENT COORDINATOR: Carl Schnitz, (512) 239-1892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: American Electric Power Services Corporation; DOCKET NUMBER: 2004- 0219-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 66444; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: office building with underground storage tank (UST); RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to ensure that the UST registration and self-certification form is submitted in a timely and proper manner; PENALTY: \$600; ENFORCEMENT COORDINATOR: Brandon Smith, (512) 239- 4471; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Aqua-Pure Water Supply Corporation dba Lakewood Harbor Water Supply; DOCKET NUMBER: 2003-1464-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 0180031; LOCATION: Meridian, Bosque County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(B)(i) and (iii) and THSC, §341.0315(c), by failing to provide the required well capacity and the required service pumping capacity; 30 TAC §290.46(e)(3)(A) and (n)(3), by failing to operate the production, treatment, and distribution facilities under the direct supervision of a water works operator and failing to provide water system records for review; PENALTY: \$945; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: City of Austin; DOCKET NUMBER: 2003-0025-EAQ-E; IDENTIFIER: Edwards Aquifer Protection Program File Number 99061402; LOCATION: Austin, Williamson County, Texas;

TYPE OF FACILITY: real property; RULE VIOLATED: 30 TAC §213.4(a), by failing to obtain approval of an Edwards Aquifer protection plan; PENALTY: \$2,300; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(6) COMPANY: Aztec Rental Center No. 2 Inc.; DOCKET NUMBER: 2004-0251-PST-E; IDENTIFIER: PST Facility Identification Number 19646; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: heavy construction equipment rental with fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), by failing to submit a PST self-certification form and by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting a regulated substance into the USTs; PENALTY: \$1,232; ENFORCEMENT COORDINATOR: Christina McLaughlin, (512) 239-6589; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Jay Brummett and George Faddoul dba Bastrop Corner Store; DOCKET NUMBER: 2003-0474-PST-E; IDENTIFIER: PST Facility Identification Number 45785; LOCATION: Bastrop, Bastrop County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c) and (d), by failing to provide a method, or combination of methods, of release detection capable of detecting release from any portion of the UST system; and 30 TAC §334.49(c)(4)(C), by failing to inspect and test the cathodic protection system for operability and adequacy of protection; PENALTY: \$3,600; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(8) COMPANY: Mukesh Patel dba Big Daddys Convenience; DOCKET NUMBER: 2004-0179-PST-E; IDENTIFIER: PST Facility Identification Number 47061 and Regulated Entity Identification Number (RN) 102713195; LOCATION: Point, Rains County, Texas; TYPE OF FACILITY: convenience store with retail gasoline sales; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), (b)(1)(A), (2)(A)(i)(III) and (ii)(I), and the Code, §26.3475(a) and (c)(1), by failing to have an acceptable method of release detection, failing to put the automatic tank gauge into test mode, failing to test a line leak detector, and failing to conduct a piping tightness test; PENALTY: \$1,300; ENFORCEMENT COORDINATOR: Brandon Smith, (512) 239-4471; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(9) COMPANY: Brazoria County Municipal Utility District No. 21; DOCKET NUMBER: 2003-0575-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 14222-001; LOCATION: Houston, Brazoria County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5), TPDES Permit Number 14222-001, and the Code, §26.121(a), by failing to comply with permitted effluent limits for total suspended solids (TSS) and minimum chlorine residual and by failing to accurately report the minimum chlorine residual; 30 TAC §317.7(e), by failing to accurately report the minimum chlorine residual; and 30 TAC §317.4(a)(7), by failing to provide stairways for basins having vertical walls; PENALTY: \$2,852; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Laura Redow Karbalai dba Carby Street Mobil Home Park; DOCKET NUMBER: 2003-1161-MWD-E; IDENTIFIER: TPDES Permit Number 14217-001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §§305.125(1), (4), (5), (9), and (11)(B)

and (C), 319.7(a), 319.1, 319.9(c), 319.11(b), and 329.5(b), TPDES Permit Number 14217-001, and the Code, §26.121(a)(1), by failing to operate and maintain the facility to prevent unauthorized discharges, failing to maintain compliance with the permit effluent limits for ammonia-nitrogen (NH<sub>3</sub>-N), failing to submit the noncompliance notification report for the unauthorized discharges of wastewater, failing to provide the noncompliance notification report for NH<sub>3</sub>-N, failing to monitor all effluent parameters, failing to provide copies of the completed discharge monitoring reports, failing to provide any monitoring and reporting data, failing to provide records adequately documenting the collection of additional samples and field measurements, failing to provide the dissolved oxygen (DO) and pH monitoring and instrument calibration records, failing to provide the sludge use and disposal activity records, failing to report the correct NH<sub>3</sub>-N daily average concentration value, and failing to report the minimum DO values; 30 TAC §317.4(g)(4)(B)(iii), by failing to provide adequate blow capacity; and 30 TAC §317.6(b)(1)(E), by failing to provide forced, mechanical ventilation in the chlorine room; PENALTY: \$11,560; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Chevron U.S.A. Inc.; DOCKET NUMBER: 2004-0304-PST-E; IDENTIFIER: PST Facility Identification Number 17941, RN100805134; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to ensure that the UST registration and self-certification form is submitted in an accurate and timely manner; PENALTY: \$600; ENFORCEMENT COORDINATOR: Leila Pezeshki, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: City of Corsicana; DOCKET NUMBER: 2004-0073-AIR-E; IDENTIFIER: Municipal Solid Waste (MSW) Permit Number 2190, RN102091998; LOCATION: Corsicana, Navarro County, Texas; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §122.121 and THSC, §382.054, by failing to obtain a Title V permit for the City of Corsicana landfill; and 30 TAC §21.4 and the Code, §26.0135(h), by failing to pay the annual consolidated water quality fee for Fiscal Year 2004; PENALTY: \$400; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Mike Muskrella dba County Line Market; DOCKET NUMBER: 2004-0109-PWS-E; IDENTIFIER: PWS Number 0790234; LOCATION: Katy, Fort Bend County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(b)(4), by failing to maintain a minimum residual disinfectant concentration of 0.2 milligrams per liter (mg/L) free chlorine; 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary control easement; and 30 TAC §290.51(a)(6), by failing to pay public health service fees; PENALTY: \$330; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Duke Energy Field Services, L.P.; DOCKET NUMBER: 2003-1094-AIR-E; IDENTIFIER: Air Account Number WC-0111-F; LOCATION: near Midland, Ward County, Texas; TYPE OF FACILITY: natural gas compressor; RULE VIOLATED: 30 TAC §106.512(2)(C)(ii) and THSC, §382.085(b), by failing to maintain records of the quarterly listing requirements for oxides of nitrogen (NO<sub>x</sub>) and carbon monoxide; PENALTY: \$1,880; ENFORCEMENT

COORDINATOR: Judy Fox, (817) 588-5800; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(15) COMPANY: Joe Shofner dba E Z Stop; DOCKET NUMBER: 2003-1585-PST-E; IDENTIFIER: PST Facility Identification Number 21855; LOCATION: Center, Shelby County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(I) and (ii)(III) and the Code, §26.3475(a) and (d), by failing to perform annual tightness tests on the pressurized piping and by failing to perform annual line leak detector tests; 30 TAC §334.8(c)(5)(C), by failing to physically label all tank fill pipes according to the registration/self-certification form; and 30 TAC §334.49(c)(4)(C), by failing to inspect the cathodic protection system and test for operability and adequacy of protection at least once during the past three years; PENALTY: \$3,120; ENFORCEMENT COORDINATOR: Craig Carson, (512) 239-5612; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: City of Earth; DOCKET NUMBER: 2003-1368-MLM-E; IDENTIFIER: Unauthorized MSW Site Number 455020031, RN101999431; LOCATION: Earth, Lamb County, Texas; TYPE OF FACILITY: unauthorized waste processing and disposal; RULE VIOLATED: 30 TAC §330.5(a), by failing to obtain a permit or other written authorization prior to operating a waste processing and disposal site; 30 TAC §330.116, by failing to control access to an MSW facility; and 30 TAC §111.210 and THSC, §382.085(b), by failing to obtain written authorization prior to conducting outdoor burning of waste material; PENALTY: \$5,600; ENFORCEMENT COORDINATOR: Christina McLaughlin, (512) 239-6589; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(17) COMPANY: FMC Technologies, Inc.; DOCKET NUMBER: 2003-1406-IWD-E; IDENTIFIER: TPDES Permit Number 02611, RN100558022; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 02611, and the Code, §26.121(a), by failing to comply with permitted effluent limits; PENALTY: \$19,950; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Five Nine Seven Limited Partnership dba Ramblewood Mobile Home Park; DOCKET NUMBER: 2003-1546-PWS-E; IDENTIFIER: PWS Identification Number 0210006; LOCATION: Bryan, Brazos County, Texas; TYPE OF FACILITY: mobile home park; RULE VIOLATED: 30 TAC §290.46(f)(2), by failing to provide water system records; 30 TAC §290.45(b)(1)(F)(i) and (ii), by failing to provide well capacity of 0.6 gallon per minute and failing to provide total storage capacity of 200 gallons per connection; 30 TAC §290.39(j), by failing to notify the commission prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or distribution facilities; 30 TAC §290.43(c)(3)(B), by failing to provide an overflow pipe on the ground storage tank and failing to provide a well casing 18 inches above the ground surface; 30 TAC §290.44(h)(4), by failing to test the backflow prevention assembly; and 30 TAC §290.41(c)(3)(O), by failing to provide an intruder-resistant fence; PENALTY: \$1,365; ENFORCEMENT COORDINATOR: John Schildwachter, (512) 239-2355; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(19) COMPANY: GSF Energy, L.L.C. dba McCarty Road Landfill Gas Recovery Facility; DOCKET NUMBER: 2003-0656-AIR-E; IDENTIFIER: Air Account Number HG-1399-S and Federal Operating Permit Number O-01512; LOCATION: Houston, Harris

County, Texas; TYPE OF FACILITY: landfill gas recovery; RULE VIOLATED: 30 TAC §117.205(d)(1) and THSC, §382.085(b), by failing to comply with the NO<sub>x</sub> reasonably available control technology emission limit of two grams per horsepower per hour; 30 TAC §122.210(a) and §122.217(a)(2), by failing to submit a permit revision application; 30 TAC §101.6(a)(1)(B) and (b)(5) and (6), (currently 30 TAC §101.201(a)(1)(B) and (b)(7)) and THSC, §382.085(b), by failing to report the emission events to the Houston Regional Office and to all local air programs with jurisdiction, and failing to record in the final record of the two emission events, the individual compound descriptive types of air contaminants; 30 TAC §116.115(c), Air Permit Number 9635, and THSC, §382.085(b), by failing to comply with the maximum allowable emissions rates table limits for NO<sub>x</sub>; 30 TAC §117.213(g)(1)(B)(i) and THSC, §382.085(b), by failing to conduct a stack test; 30 TAC §122.145(2)(C) and THSC, §382.085(b), by failing to submit a deviation report; and 30 TAC §101.359(H)(3) and THSC, §382.085(b), by failing to submit Form ECT-1, Annual Compliance Report; PENALTY: \$17,136; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Cherian Zachariah dba J & C Mobil and dba Go For It Foods; DOCKET NUMBER: 2003-0803-PST-E; IDENTIFIER: PST Facility Identification Numbers 14941 and 67011; LOCATION: Stafford, Fort Bend County, Texas; TYPE OF FACILITY: convenience stores with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: \$10,460; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: City of Gonzales; DOCKET NUMBER: 2004-0205-MWD-E; IDENTIFIER: TPDES Permit Number 10488-001; LOCATION: Gonzales, Gonzales County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10488-001, and the Code, §26.121(a), by failing to comply with the daily average permit limit of 15 mg/L for TSS at outfall 001A; PENALTY: \$3,760; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(22) COMPANY: City of Graham; DOCKET NUMBER: 2003-0450-PWS-E; IDENTIFIER: PWS Number 2520001, RN101386308; LOCATION: Graham, Young County, Texas; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.44(h)(1) and (4), by failing to install and test backflow prevention devices; 30 TAC §290.43(c)(8), by failing to maintain the elevated water storage tank in accordance with commission rules and American Water Works Association standards; 30 TAC §290.42(d)(5), by failing to provide flow measuring devices for the filter backwash and recycled water at the surface water treatment plant; and 30 TAC §290.46(s)(1), by failing to calibrate the flow measuring devices at the surface water treatment plant annually; PENALTY: \$16,302; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(23) COMPANY: City of Graham; DOCKET NUMBER: 2003-0595-WR-E; IDENTIFIER: PWS Number 2520001, RN101386308; LOCATION: Graham, Young County, Texas; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §288.2 and §288.30(1) and the Code, §11.1271(a), by failing to develop and submit a water conservation plan for a retail public water supplier; 30 TAC §288.5, by failing to develop and submit a water conservation plan for a wholesale public water supplier; and 30 TAC §288.22 and §288.30(4) and the Code,

§11.1272(a), by failing to develop and submit a drought contingency plan for a wholesale public water supplier; PENALTY: \$4,275; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(24) COMPANY: Great Plains Cattle Feeders, Inc.; DOCKET NUMBER: 2004-0240-AGR-E; IDENTIFIER: TPDES Registration Number 0002217-000, RN102990173; LOCATION: near Hereford, Deaf Smith County, Texas; TYPE OF FACILITY: cattle feedlot; RULE VIOLATED: 30 TAC §321.31(a), TPDES Registration Number 0002217-000, and the Code, §26.121(a), by failing to comply with rule requirements regarding the unauthorized discharge of wastewater; PENALTY: \$3,200; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(25) COMPANY: Harlingen Medical Center, Limited Partnership; DOCKET NUMBER: 2004-0279-PST-E; IDENTIFIER: PST Facility Identification Number 75045, RN102961257; LOCATION: Harlingen, Cameron County, Texas; TYPE OF FACILITY: medical center; RULE VIOLATED: 30 TAC §334.51(b)(2)(C) and THSC, §26.347(c)(2), by failing to equip the PST at the facility with an overflow prevention device; 30 TAC §334.8(c)(5)(B)(ii), by failing to renew a delivery certificate in a timely and proper manner; and 334.5(b)(1)(A) and THSC, 26.3467, by failing to make available to a common carrier a valid, current TCEQ delivery certificate before delivery of a regulated substance into the UST; PENALTY: \$1,300; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(26) COMPANY: Hunt Oil Company; DOCKET NUMBER: 2003-0642-AIR-E; IDENTIFIER: Air Account Numbers HM-0010-V, HM-0161-W, HM-0160-B, RN100226273, RN102563863, and RN100226315; LOCATION: near Poynor, Henderson County, Texas; TYPE OF FACILITY: gas processing, tank battery, and water station; RULE VIOLATED: 30 TAC §122.145(2)(B) and §122.146(1) and THSC, §382.085(b), by failing to submit five Title V compliance certifications and associated deviation reports for General Operating Permit (GOP) Numbers O-00159 and O-00161, at the Fairway gas plant and the water station, for the annual reporting periods ending July 14, 1998, 1999, 2000, 2001, and 2002; and by failing to submit five Title V compliance certifications and associated deviation reports for GOP Number O-00167, at the central tank battery, for the annual reporting periods ending July 16, 1998, 1999, 2000, 2001, and 2002; PENALTY: \$22,500; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(27) COMPANY: Inara Convenience Inc.; DOCKET NUMBER: 2003-1588-PST-E; IDENTIFIER: PST Facility Identification Number 5590, RN101534790; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(c) and §334.50(d)(1)(B)(ii) and the Code, §26.3475(a) and (c)(1), by failing to conduct effective manual or automatic inventory control procedures for the UST systems; and 30 TAC §334.50(b), (b)(1)(A), (b)(2) and (2)(A)(i)(III), by failing to monitor USTs for releases at least once every month, not to exceed 35 days between each monitoring; PENALTY: \$8,320; ENFORCEMENT COORDINATOR: Sushil Modak, (512) 239-2142; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: J.J.S. Enterprises, Inc.; DOCKET NUMBER: 2004-0103-AIR-E; IDENTIFIER: Air Account Number EE-0795-R, RN100813252; LOCATION: Anthony, El Paso County, Texas; TYPE

OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline to a storage vessel and dispensed gasoline in a motor vehicle with a Reid vapor pressure greater than seven pounds per square inch absolute; PENALTY: \$720; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(29) COMPANY: J.A.M. Distributing Company; DOCKET NUMBER: 2003-1596-PST-E; IDENTIFIER: PST Facility Identification Number T002445; LOCATION: Alvin, Brazoria County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: \$800; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(30) COMPANY: City of Jasper; DOCKET NUMBER: 2003-1123-MLM-E; IDENTIFIER: TPDES Permit Number 10197-001, PWS Number 1210001, RN101052132, RN101385250; LOCATION: Jasper, Jasper County, Texas; TYPE OF FACILITY: wastewater treatment and public drinking water system; RULE VIOLATED: 30 TAC §305.125(1) and (5) and TPDES Permit Number 10197-001, by failing to ensure that all systems of collection, treatment, and disposal are properly operated and maintained, failing to prevent the discharge of partially treated wastewater into, or adjacent to, waters in the state without authorization, and failing to notify the TCEQ in writing at least 45 days prior to the completion of the new facility; 30 TAC §319.11(c), by failing to use the prescribed procedures outlined for conducting pollutants analysis; 30 TAC §319.7(a), by failing to maintain adequate records of the monitoring activities; 30 TAC §290.43(c)(6) and (d)(3) and §290.46(m)(4) and THSC, §341.036(a), by failing to ensure that all potable water storage tanks are thoroughly tight against leakage, failing to ensure that the facilities maintaining the air-water-volume ratio are functioning properly, and failing to implement good housekeeping and maintenance practices to ensure good working conditions and appearance of the system's facilities and equipment; and 30 TAC 290.42(e)(4)(B), by failing to house gas chlorination facilities in separate buildings or separate rooms with walls or partitions separating electrical equipment from the chlorine facilities; PENALTY: \$15,602; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(31) COMPANY: KDT Construction, Inc.; DOCKET NUMBER: 2004-0257-OSI-E; IDENTIFIER: On-Site Sewage Facility (OSSF) Installer Identification Number OS0006580, RN102081106; LOCATION: Kirvin, Freestone County, Texas; TYPE OF FACILITY: sewage system installation; RULE VIOLATED: 30 TAC §285.61(4) and THSC, §366.004 and §366.051(c), by failing to document that the owner or owner's agent had obtained a permit prior to beginning construction of an OSSF; PENALTY: \$200; ENFORCEMENT COORDINATOR: Christopher Miller, (915) 698-9674; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(32) COMPANY: City of Lawn; DOCKET NUMBER: 2003-0324-PWS-E; IDENTIFIER: PWS Number 2210005, RN101406916; LOCATION: Lawn, Taylor County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.42(d)(11)(B)(vi) and (h) and THSC, §341.0315(c), by failing to meet the minimum water system capacity requirements and failing to obtain a wastewater discharge permit for the disposal of filtration backwash water; 30 TAC §290.44(d), by failing to maintain a minimum pressure of 35 pounds per square inch at all points within the distribution network; 30 TAC

§290.46(m)(1) and (2), by failing to conduct annual water storage tank inspections and failing to conduct annual internal storage tank inspections of pressure filters; 30 TAC §290.110(c)(1)(B), by failing to properly complete monthly operational reports; 30 TAC 290.42(6)(E)(ii)(I), by failing to provide spill containment facilities for chemical storage tanks; 30 TAC §290.43(c)(1), (2), (5), and (8), by failing to properly screen roof vents, by failing to provide a 30-inch access opening on the Hudson and Chatham groundwater storage tanks, by failing to properly maintain exterior surfaces on water storage facilities, and by failing to provide proper inlet and outlet connections on water storage facilities; PENALTY: \$2,885; ENFORCEMENT COORDINATOR: Bill Davis, (512) 239-6793; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(33) COMPANY: Leading Edge Aviation Services Amarillo, Inc.; DOCKET NUMBER: 2003-0268-IHW-E; IDENTIFIER: Solid Waste Registration Number 83022; LOCATION: Amarillo, Potter County, Texas; TYPE OF FACILITY: aircraft repainting; RULE VIOLATED: 30 TAC §335.13(k) and 40 CFR §262.42(a)(2), by failing to submit an exception report for not receiving an original copy of a manifest from the designated facility within 45 days after the initial transporter accepted the waste; and 30 TAC §335.323, by failing to pay outstanding hazardous waste generation fees; PENALTY: \$720; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(34) COMPANY: Nasrolah Kamalie dba Lucky Way Food Store; DOCKET NUMBER: 2003-1576-PST-E; IDENTIFIER: PST Facility Identification Number 45459; LOCATION: Galveston, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: \$525; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(35) COMPANY: Mack Massey Motors, LP; DOCKET NUMBER: 2003-1282-PST-E; IDENTIFIER: PST Facility Identification Number 18758; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: motor vehicle dealership; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(A)(i), by failing to ensure that a fuel delivery certificate was renewed in a timely and proper manner and failing to make available a valid, current TCEQ fuel delivery certificate to a common carrier prior to receiving fuel deliveries; PENALTY: \$1,632; ENFORCEMENT COORDINATOR: Mauricio Olaya, (915) 834-4949; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(36) COMPANY: City of Malone; DOCKET NUMBER: 2003-1382-MWD-E; IDENTIFIER: TPDES Permit Number 10514-001, RN102075660; LOCATION: Malone, Hill County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(1), (2), and (5), TPDES Permit Number 10514-001, and the Code, §26.121, by failing to comply with the permitted limits at outfall 001 and by discharging wastewater without a permit; PENALTY: \$14,250; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(37) COMPANY: Manchaca Service Center, Inc.; DOCKET NUMBER: 2003-1551-PST-E; IDENTIFIER: PST Facility Identification Number 16311, RN101494904; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: service station with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a) and (c)(2)(C) and the Code, §26.3475(d), by failing to provide corrosion protection and failing to ensure that the rectifier and other system components



are operating properly; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(b) and (c)(1), by failing to conduct release detection; PENALTY: \$5,400; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(38) COMPANY: Manora Enterprises Inc. dba Mikes Short Stop; DOCKET NUMBER: 2004-0280-PST-E; IDENTIFIER: PST Facility Identification Number 61916; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to perform tests to verify the proper operation of Stage II equipment; PENALTY: \$800; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(39) COMPANY: McCraw Oil Company, Inc.; DOCKET NUMBER: 2004-0009-PST-E; IDENTIFIER: RN102080645; LOCATION: Lavon, Collin County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: \$4,000; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(40) COMPANY: Mockingbird Skillman Mobil, Inc. dba Mockingbird Mobil; DOCKET NUMBER: 2003-1595-AIR-E; IDENTIFIER: RN102765773; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: vehicle safety and emission certification station; RULE VIOLATED: 30 TAC §114.50(d)(1) and THSC, §382.085(b), by allowing the issuance of an emission inspection certificate; PENALTY: \$638; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(41) COMPANY: Motiva Enterprises LLC; DOCKET NUMBER: 2003-1186-AIR-E; IDENTIFIER: Air Account Number JE-0095-D; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §§101.7(a), 101.20(1), 116.115(b)(2) and (2)(G) and (c), 116.715(a), (c)(7) and (9), and 116.721(a), Air Permit Numbers 6056, 3415, and 8404, 40 CFR §60.18(c)(2) and §60.104(a)(1), and THSC, §382.085(a) and (b), by failing to prevent unauthorized emissions; 30 TAC §111.111(a)(1)(A) and THSC, §382.085(b), by failing to prevent the unauthorized exceedance of opacity limits; 30 TAC §101.6(a)(1)(B), effective until September 1, 2002, and §101.201(a)(1)(B), (2)(H), and (b)(6) - (10), and THSC, §382.085(b), by failing to submit seven initial notifications for reportable emissions events, failing to include the authorized emission limits on initial reports, failing to include the compound descriptive type of contaminants, and failing to include all required information on final reports of emission events; 30 TAC §101.6(b)(1), effective until September 1, 2002, (4), (5), and (6), and §101.201(b)(10), and THSC, §382.085(b), by failing to include the cause, duration, compound descriptive type of contaminants, and total estimated quantities for all emissions and failing to create a final record for an emission event; 30 TAC §101.211(a) and THSC, §382.085(b), by failing to notify the agency of a maintenance event; 30 TAC §116.715(a) and (c)(7), Air Permit Number 8404, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.4 and §116.715(a) and (c)(7), Air Permit Number 8404, and THSC, §382.085(a) and (b), by failing to prevent unauthorized emissions which created a nuisance condition; PENALTY: \$517,477; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(42) COMPANY: Motiva Enterprises, LLC; DOCKET NUMBER: 2004-0045-AIR-E; IDENTIFIER: Air Account Number JE-0095-D; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.715(a) and (c)(7), Flexible Permit Number 8404, and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits; and 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to notify the TCEQ regional office no later than 24 hours after the discovery of an excess opacity event; PENALTY: \$38,475; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(43) COMPANY: Nueces County Water Control & Improvement District No. 5; DOCKET NUMBER: 2003-0473-MLM-E; IDENTIFIER: TPDES Permit Number 11583-001, PWS Number 1780010; LOCATION: near Banquete, Nueces County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), (4), and (5), TPDES Permit Number 11583-001, and the Code, §26.121(a), by discharging floating solids into Banquete Creek, by allowing infiltration and inflow in the collection system, by failing to submit the Fiscal Year 2002 annual sludge report, by failing to operate the clarification system at the facility as designed, by failing to operate and maintain the chlorine contact chamber as required, by failing to properly maintain the sludge drying beds, and by failing to calibrate the automatic flow measuring device on an annual basis or as often as necessary to ensure accuracy; and 30 TAC §290.44(h)(1)(A) and THSC, §341.033(f), by failing to install a back-flow prevention device; PENALTY: \$6,600; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas, 78412-5503, (361) 825-3100.

(44) COMPANY: Pioneer Natural Resources USA, Inc.; DOCKET NUMBER: 2004-0230-AIR-E; IDENTIFIER: Air Account Number MR-0121-W, RN100216050; LOCATION: Masterson, Moore County, Texas; TYPE OF FACILITY: natural gas compression plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the annual certification of compliance with Title V Operating Permit Number O-01295; PENALTY: \$1,500; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(45) COMPANY: Praxair, Inc.; DOCKET NUMBER: 2003-0988-PST-E; IDENTIFIER: PST Facility Identification Number 11161, RN102684974; LOCATION: Deer Park, Harris County, Texas; TYPE OF FACILITY: fleet fueling; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: \$3,030; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(46) COMPANY: Ricetec, Inc.; DOCKET NUMBER: 2003-0365-MWD-E; IDENTIFIER: TPDES Permit Number 14068-001; LOCATION: Alvin, Brazoria County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and §312.43(a)(2)(B), TPDES Permit Number 14068-001, and the Code, §26.121(a), by failing to comply with the minimum total chlorine residual, failing to maintain compliance with the permit effluent limits for TSS, pH, and DO, failing to provide noncompliance notification reports for effluent violations, and failing to conduct the sludge analysis for metal constituents annually; PENALTY: \$10,500; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.



(47) COMPANY: Perwez Holubhoy dba Sam's Beverages of Plano; DOCKET NUMBER: 2003-1570-PST-E; IDENTIFIER: PST Facility Identification Number 72959, RN102052164; LOCATION: Plano, Collin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(A)(i) and (B)(ii) and the Code, §26.3467(a), by failing to renew a previously issued delivery certificate in a timely manner and failing to make available to a common carrier a valid, current delivery certificate; PENALTY: \$1,440; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(48) COMPANY: Sattar Investments, Inc. dba CFM Florence; DOCKET NUMBER: 2003- 1556-PST-E; IDENTIFIER: PST Facility Identification Number 70929; LOCATION: Florence, Williamson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(4)(C) and the Code, §26.3475(d), by failing to inspect and test the corrosion protection system; 30 TAC §334.48(c), by failing to conduct inventory control; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475, by failing to put the automatic tank gauge into test mode; PENALTY: \$3,900; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(49) COMPANY: Sid Richardson Pipeline, Ltd.; DOCKET NUMBER: 2003-0275-AIR-E; IDENTIFIER: Air Account Number PE-0042-O; LOCATION: near Coyanosa, Pecos County, Texas; TYPE OF FACILITY: natural gas processing, acid gas treating, and sulphur recovery; RULE VIOLATED: 30 TAC §122.145(2)(C) and §122.143(4) and THSC, §382.085(b), by failing to submit the deviation report in a timely manner; and 30 TAC §116.115(c) and Permit Number 2351A, by failing to document daily audio, olfactory, and visual checks for all piping, valves, and compressors in hydrogen sulfide service; PENALTY: \$5,200; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(50) COMPANY: Sok Sun Yang dba Stop by Mart; DOCKET NUMBER: 2003-0336-PST-E; IDENTIFIER: PST Facility Identification Number 17068, RN102236080; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2)(B) and the Code, §26.3475(c)(1), by failing to conduct vapor monitoring and failing to perform release detection monitoring; 30 TAC §334.48(c), by failing to conduct inventory control; 30 TAC §334.10(b)(2)(B)(v) and §334.49(e), by failing to maintain records that document all tanks and piping are adequately protected from corrosion; and 30 TAC §334.8(c)(5)(C), by failing to provide a legible tag, label, or marking to either the top of the fill tube or to a removable point; PENALTY: \$4,480; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 239-4492; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(51) COMPANY: The Lookout Partners, LP; DOCKET NUMBER: 2004-0286-EAQ-E; IDENTIFIER: Edwards Aquifer Site Registration Number 11-03040301, RN103155891; LOCATION: Leander, Williamson County, Texas; TYPE OF FACILITY: single-family residential subdivision; RULE VIOLATED: 30 TAC §213.23(a)(1), by failing to obtain approval from the executive director of an Edwards Aquifer contributing zone plan prior to commencing construction of any regulated activity; PENALTY: \$1,500; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425- 6010; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(52) COMPANY: Three L., Inc. dba Sugar Land Bulk Oil Co.; DOCKET NUMBER: 2004- 0198-PST-E; IDENTIFIER: RN102293420; LOCATION: Richmond, Fort Bend County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to observe a valid, current delivery certificate prior to making fuel deliveries; PENALTY: \$800; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(53) COMPANY: Tifco Industries, Inc.; DOCKET NUMBER: 2003-1578-MWD-E; IDENTIFIER: TPDES Permit Number 12465-001; LOCATION: Cypress, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 12465-001, and the Code, §26.121(a), by failing to maintain permitted limits DO, NH<sub>3</sub>-N, and five-day carbonaceous biochemical oxygen demand, and pH; PENALTY: \$4,020; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(54) COMPANY: Tucker Fuel & Oil Company, Inc.; DOCKET NUMBER: 2004-0193-PST-E; IDENTIFIER: RN100524263; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: \$360; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825- 3100; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(55) COMPANY: University of Texas Medical Branch at Galveston; DOCKET NUMBER: 2004-0124-PST-E; IDENTIFIER: PST Facility Identification Numbers 30977 and 37587; LOCATION: Galveston, Galveston County, Texas; TYPE OF FACILITY: hospital with fleet fueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i) and the Code, §26.346(a) and §26.3467(a), by failing to submit a UST registration and self-certification form and failing to make available to a common carrier a valid, current delivery certificate; PENALTY: \$2,200; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(56) COMPANY: Van Hairgrove dba Van's Food Mart; DOCKET NUMBER: 2003-1180-PST- E; IDENTIFIER: PST Facility Identification Number 0032139; LOCATION: Center, Shelby County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to have corrosion protection for the UST system; 30 TAC §334.8(c)(5)(C), by failing to physically label all tank fill pipes; and 30 TAC §334.48(c), by failing to conduct inventory control for all USTs; PENALTY: \$600; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(57) COMPANY: Richard Allen Verry; DOCKET NUMBER: 2004-0040-MWD-E; IDENTIFIER: TPDES Permit Number 12310-001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 12310-001, and the Code, §26.121(a), by failing to comply with the permitted limits for NH<sub>3</sub>-N, DO, TSS, and flow; PENALTY: \$2,400; ENFORCEMENT COORDINATOR: Michael Limos, (512) 239-5839; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(58) COMPANY: Mr. W Fireworks, Inc.; DOCKET NUMBER: 2004-0116-EAQ-E; IDENTIFIER: Edwards Aquifer Site Registration Number 13-03041103, RN101101770; LOCATION: San Antonio, Bexar

County, Texas; TYPE OF FACILITY: retail outlet with sales of seasonal items; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to submit application for, and receive approval of, an Edwards Aquifer water pollution abatement plan; PENALTY: \$3,264; ENFORCEMENT COORDINATOR: Lori Thompson, (903) 535-5100; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(59) COMPANY: Willis Carroll Beyer Estate Trust dba Producers Compost; DOCKET NUMBER: 2004-0123-AGR-E; IDENTIFIER: RN103144622; LOCATION: Stephenville, Erath County, Texas; TYPE OF FACILITY: organic compost production; RULE VIOLATED: the Code, §26.121(a)(1), by failing to prevent unauthorized discharges from a diversion berm; PENALTY: \$1,040; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL

OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200403184

Paul C. Sarahan

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: May 11, 2004

◆ ◆ ◆  
**Texas Department of Health**

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

**NEW LICENSES ISSUED:**

Location	Name	License #	City	Amend-ment #	Date of Action
Allen	Presbyterian Medical Center DBA Presbyterian Hospital of Allen	L05765	Allen	00	04/27/04
Bridgeport	BASC Management LLC DBA Bridgeport Ambulatory Surgical Center	L05734	Bridgeport	00	04/29/04
Del Rio	Broad Horizon Imaging Inc. DBA Broad Horizon	L05720	Del Rio	00	04/27/04
Gun Barrel City	Heartmasters PA	L05760	Gun Barrel City	00	04/22/04

**AMENDMENTS TO EXISTING LICENSES ISSUED:**

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	National Central Pharmacy	L04781	Abilene	21	04/30/04
Alvin	Amoco Chemical Company	L01422	Alvin	58	04/20/04
Amarillo	Northwest Texas Healthcare System Inc. DBA Northwest Texas Hospital	L02054	Amarillo	71	04/27/04
Andrews	Waste Control Specialists LLC	L04971	Andrews	25	04/27/04
Arlington	Metroplex Hematology Oncology Associates DBA Arlington Cancer Center	L03211	Arlington	70	04/26/04
Austin	Cedra Corporation	L04427	Austin	12	04/20/04
Austin	HTI/ADC Venture DBA North Austin Medical Center	L04910	Austin	39	04/27/04
Austin	HTI/ADC Venture DBA North Austin Medical Center	L04910	Austin	40	04/29/04
Corpus Christi	Corpus Christi Radiology Center	L04493	Corpus Christi	13	04/15/04
Corpus Christi	Valero Refining – Texas LP	L03360	Corpus Christi	20	04/26/04
Dallas	Medical City Dallas Hospital DBA Medical City	L01976	Dallas	148	04/14/04
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	81	04/29/04
Denton	Columbia Medical Center of Denton Subsidiary LP DBA Denton Regional Medical Center	L02764	Denton	52	04/19/04
Denton	Trace Radiochemicals Inc.	L05435	Denton	06	04/19/04
Denton	Neorx Manufacturing Group Inc	L05433	Denton	11	04/28/04
El Paso	Providence Memorial Hospital	L02353	El Paso	78	04/23/04
Fort Worth	David F Corral MD PA	L05650	Fort Worth	02	04/16/04
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	90	04/27/04
Georgetown	Georgetown Healthcare System	L03152	Georgetown	31	04/22/04
Hallettsville	Lavaca Medical Center	L04397	Hallettsville	06	04/28/04
Houston	Angiocardiatic Care of Texas PA	L05011	Houston	07	04/19/02
Houston	Cardiovascular Ventures of West Houston Inc. DBA Raytel Nuclear Imaging West Houston Inc.	L04882	Houston	15	04/26/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend- ment #	Date of Action
Houston	Diagnostic Clinic of Houston Nuclear Medicine	L03452	Houston	27	04/22/04
Houston	Digirad Imaging Solutions Inc.	L05414	Houston	20	04/15/04
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Southwest	L00439	Houston	93	04/15/04
Houston	Memorial Hermann Hospital System Inc. DBA Memorial Hermann Hospital	L00650	Houston	67	04/22/04
Houston	North Houston Cardiac Imaging LTD LLP	L05513	Houston	02	04/20/04
Houston	Park Plaza Hospital	L02071	Houston	47	04/16/04
Houston	Tenet Healthcare LTD DBA Twelve Oaks Medical Center	L02432	Houston	37	04/28/04
Irving	Healthcare Associates of Irving LP	L05371	Irving	02	04/16/04
Katy	Saint Catherine Health and Wellness Center	L05310	Katy	06	04/15/04
La Porte	E I Dupont De Nemours & Company	L00314	La Porte	77	04/26/04
Laredo	Ricardo G. Cigarroa MD	L04687	Laredo	04	04/26/04
Lubbock	University Medical Center	L04719	Lubbock	68	04/16/04
Lubbock	University Medical Center	L04719	Lubbock	69	04/23/04
Lubbock	Covenant Health System DBA Covenant Medical Center – Lakeside	L01547	Lubbock	78	04/27/04
Lufkin	The Heart Institute of East Texas PA	L04147	Lufkin	10	04/19/04
Lufkin	Piney Woods Healthcare System LP DBA Woodland Heights Medical Center	L01842	Lufkin	45	04/28/04
Marble Falls	Marble Falls Imaging Center LP DBA Marble Falls Imaging Center	L05301	Marble Falls	03	04/23/04
McAllen	McAllen Hospitals LP DBA McAllen Medical Heart Hospital	L04902	McAllen	10	04/28/04
Mesquite	HMA Mesquite Hospitals Inc. DBA Medical Center of Mesquite	L02428	Mesquite	37	04/26/04
Nederland	The Medical Center of Southeast Texas LP DBA Mid Jefferson Hospital	L01756	Nederland	46	04/22/04
Nocona	Nocona Hospital District DBA Nocona General Hospital	L04977	Nocona	06	04/14/04
Palestine	Palestine Principal Healthcare Limited Partnership DBA Palestine Regional Medical Center	L02728	Palestine	36	04/23/04
Port Arthur	Gulf Coast Cardiology Group PA	L05393	Port Arthur	12	04/28/04
Richardson	Siemens Maintenance Services LLC	L05660	Richardson	01	04/23/04
San Antonio	Heart Hospital of San Antonio LP DBA Texsan Heart Hospital	L05722	San Antonio	03	04/19/04
San Antonio	Cardiology Clinic of San Antonio PA	L04489	San Antonio	27	04/28/04
Stephenville	Stephenville Medical and Surgical Clinic	L05309	Stephenville	04	04/29/04
Sugar Land	Methodist Health Centers DBA Methodist Willowbrook Hospital	L05472	Sugar Land	12	04/27/04
Temple	Specialty Pharmacy Services Inc.	L04883	Temple	21	04/29/04
Throughout Tx	Talon Drilling Inc. DBA Llano-Permian Environmental	L05641	Amarillo	01	04/28/04
Throughout Tx	Aitec USA Inc.	L05718	Houston	05	04/26/04
Throughout Tx	Continental Airlines Inc.	L02718	Houston	36	04/20/04
Throughout Tx	Halliburton Energy Services Inc.	L03284	Houston	27	04/26/04
Throughout Tx	HVJ Associates Inc.	L03813	Houston	24	04/26/04
Throughout Tx	Mandes Inspection & Testing Services Inc.	L05220	Houston	39	04/23/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend- ment #	Date of Action
Throughout Tx	Metco	L03018	Houston	144	04/15/04
Throughout Tx	Real Inspection Training Engineering	L05136	Houston	09	04/20/04
Throughout Tx	Shaw Fabricators	L05169	Houston	07	04/20/04
Throughout Tx	Superior Energy LLC	L05540	Houston	04	04/27/04
Throughout Tx	Site Concrete Inc.	L05025	Irving	04	04/20/04
Throughout Tx	Longview Inspection Inc.	L01774	La Porte	202	04/28/04
Throughout Tx	High Tech Testing Service Inc.	L05021	Longview	45	04/26/04
Throughout Tx	ADJ Services	L04142	Longview	14	04/29/04
Throughout Tx	HIS Inspection Inc.	L04861	Midland	10	04/27/04
Throughout Tx	Black Warrior Wireline Corporation	L04473	Odessa	18	04/23/04
Throughout Tx	Conam Inspection & Engineering Inc.	L05010	Pasadena	70	04/23/04
Throughout Tx	Fugro South Inc.	L04322	Pasadena	68	04/20/04
Throughout Tx	Texas Gamma Ray LLC	L05561	Pasadena	37	04/26/04
Throughout Tx	X-R-I Non-Destructive Testing	L05275	Pearland	35	04/26/04
Throughout Tx	Professional Service Industries Inc.	L04946	San Antonio	06	04/16/04
Throughout Tx	Professional Service Industries Inc.	L04946	San Antonio	07	04/27/04
Throughout Tx	GCT Inspection Inc.	L02378	South Houston	78	04/29/04
Throughout Tx	H & H X-Ray Services Inc. DBA Mississippi XRAY Service Inc . Monroe XRAY Company Inc. and Waggoner & Associates Inc.	L02516	Tyler	45	04/20/04
Tyler	East Texas Medical Center	L00977	Tyler	106	04/19/04

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend- ment #	Date of Action
Beaumont	Lamar University Risk Management	L04047	Beaumont	18	04/28/04
Houston	Saint Lukes Episcopal Health System Corporation DBA Saint Lukes Episcopal Health System and Texas Heart Institute	L00581	Houston	78	04/20/04
Houston	Park Plaza Hospital	L03612	Houston	06	04/26/04
Houston	Rice University	L04639	Houston	07	04/28/04
Irving	University of Dallas	L01194	Irving	11	04/22/04
Paris	Essent PRMC LP DBA Paris Regional Medical Center	L03199	Paris	27	04/29/04
Terrell	Terrell Healthcare LP DBA Medical Center at Terrell	L03048	Terrell	16	04/29/04
Throughout Tx	Berry Fabricators	L01575	Corpus Christi	45	04/27/04
Throughout Tx	Apollo Perforators Inc.	L03020	Odessa	14	04/20/04
Throughout Tx	Zachry Construction Corporation	L01995	San Antonio	23	04/15/04

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend- ment #	Date of Action
Canyon	West Texas State University	L00583	Canyon	27	04/22/04
Haltom	21 <sup>st</sup> Century Technologies Inc.	L05013	Haltom	06	04/28/04
Throughout Tx	Housing Authority of the City of El Paso	L05154	El Paso	03	04/15/04
Throughout Tx	PET Scans of America Corporation	L05487	Fort Lee	02	04/26/04

**LICENSE EXEMPTION ISSUED:**

Location	Name	License #	City	Amend- ment #	Date of Action
Houston	Park Plaza Hospital	L03612	Houston		04/06/04
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Memorial City	L01168	Houston		04/27/04
Irving	Site Concrete Incorporated	L05025	Irving		04/20/04

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC), Chapter 289, the Texas Department of Health (department), Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC, Chapter 289. In granting termination of licenses, the department has determined that the licensee has properly decommissioned its facilities according to the applicable requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49<sup>th</sup> Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200403070  
Susan K. Steeg  
General Counsel  
Texas Department of Health  
Filed: May 6, 2004

**Notice of Intent to Revoke Certificates of Registration**

Pursuant to 25 Texas Administrative Code, §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following registrants: Southwest Airlines, Dallas, R03972; Arnold Ravdel, M.D., Houston, R09064; Jose E. Aguirre, D.M.D., San Antonio, R13232; Cy Fair Medical Clinic, Houston, R14471; J M Circuits, Inc., Arlington, R19787; Medcomap, Richardson, R22166; Joshua Family Dentistry, Joshua, R22727; Accident & Wellness Chiropractic, Dallas, R23423; Cecil A. Walkes, M.D., Port Arthur, R23513; Medtierra, Inc., Austin, R23527; Clinica Santa Teresa, Houston, R25597; Nueces County Medical Examiners Office, Corpus Christi, R25713; Grant J. Kirkland, M.D., F.A.C.O.G., Mesquite, R25720; Jeffery L. Little, D.C., Flower Mound, R26382; WHMC, Inc., Houston, Z00701; Laser Comm, Inc., Plano, Z01417; Laser Creations, LLC, Round Rock, Z01509.

The complaints allege that these registrants have failed to pay required annual fees. The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200403076  
Susan K. Steeg  
General Counsel  
Texas Department of Health  
Filed: May 6, 2004

**Houston-Galveston Area Council****Proposed Changes to Financial Assistance for Child Care**

The Gulf Coast Workforce Board seeks public comment on two proposed policy changes. The first proposed change concerns the collection of parent co-payment fees. The second proposal increases the number of work, training or education hours for low-income customers who receive financial assistance through The WorkSource.

The first recommended change would give authority to providers to make arrangements for the collection of delinquent co-payment fees or

to end the placement for customers who do not pay co-payment fees. Customers who receive financial assistance from The WorkSource must contribute a co-payment fee to offset the cost of child care. A customer with one child in care pays a monthly co-payment fee based on 11% of her monthly income. The current process for collecting co-payment fees involves multiple transactions on the part of The WorkSource and Provider staff which is administratively timely and costly. In effect, customers who do not adhere to the terms of their co-payment agreement would lose financial aid for child care. When delinquent fees are paid, customers would be able to re-apply for financial aid through The WorkSource as a new customer-which often means going on the wait list.

The second policy change would increase the eligibility requirement from 20 hours of work or work/school to 30 hours in order to align our financial aid policy more closely with other requirements for our customers and encourage our customers to work, or work and attend school, on a full-time basis to achieve self-sufficiency.

A report issued by the Department of Labor Bureau of Labor Statistics states that "working full time substantially lowers a person's probability of being poor." The Bureau of Labor Statistics defines full time work hours as 35 or more work hours per week. Between 35% and 40% of our customers receiving financial aid for child care are welfare recipients who must work or participate in work-related activities (including going to school) at least 30 hours per week. Of the remaining 60% of our customers who receive financial aid for child care, only one quarter work, or work and go to school, less than 30 hours per week. We would exempt customers who have a documented medical disability that prevents them from working 30 hours per week or who cannot work 30 hours per week because they care for a physically or mentally disabled family member. We would continue to review these exemptions on a regular basis when we review a customer's eligibility for our financial aid.

The Board is scheduling one public hearing on May 12th from 4:30 p.m. to 6:00 p.m. to hear comments on the proposed changes. Please check The WorkSource calendar (under General Information) at [www.theworksource.org](http://www.theworksource.org) for details or updated information. Interested parties may submit written comments on the proposed policy by letter (mail to Lucretia Hammond, Gulf Coast Workforce Board, P.O. Box 22777, Houston, Texas 77227-2777), by fax to (713) 993-4578, or by e-mail to [lucretia.hammond@theworksource.org](mailto:lucretia.hammond@theworksource.org). The comment period ends on May 24, 2004.

TRD-200403077  
Jack Steele  
Executive Director  
Houston-Galveston Area Council  
Filed: May 6, 2004

## **Texas Department of Insurance**

### **Company Licensing**

Application to change the name of SECURITY MUTUAL LIFE INSURANCE COMPANY OF NEW YORK to SECURITY LIFE INSURANCE COMPANY OF NEW YORK, a foreign life, accident and/or health company. The home office is in Binghamton, New York.

Application to change the name of ERC LIFE REINSURANCE CORPORATION to SCOTTISH RE LIFE CORPORATION, a foreign life, accident and/or health company. The home office is in Jefferson City, Missouri.

Application for a new organization applying for a certificate of authority in the State of Texas by 21ST CENTURY INSURANCE COMPANY OF ARIZONA, a domestic fire and/or casualty company. The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas, 78701, within 20 days of the *Texas Register* published date.

TRD-200403226  
Gene C. Jarmon  
General Counsel and Chief Clerk  
Texas Department of Insurance  
Filed: May 12, 2004

### **Third Party Administrator Applications**

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of GENISYSTEMS.CA SERVICES, INC., an alien third party administrator. The home office is Toronto, Ontario, Canada.

Application for admission to Texas of AETNA HEALTH ADMINISTRATORS, LLC, a foreign third party administrator. The home office is Blue Bell, Pennsylvania.

Application for incorporation in Texas of FONDREN ORTHOPEDIC SERVICES, INC., a domestic third party administrator. The home office is Houston, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200403200  
Gene C. Jarmon  
General Counsel and Chief Clerk  
Texas Department of Insurance  
Filed: May 12, 2004

## **Public Utility Commission of Texas**

### **Notice of Application for Amendment to Service Provider Certificate of Operating Authority**

On May 3, 2004, Commserv filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60283. Applicant intends to remove the resale-only restriction.

The Application: Application of Commserv for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 29658.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 26, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29658.

TRD-200403075

Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 6, 2004

◆ ◆ ◆  
**Notice of Application for Amendment to Service Provider  
Certificate of Operating Authority**

On May 6, 2004, NewPhone filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60690. Applicant intends to remove the resale-only restriction.

The Application: Application of NewPhone for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 29673.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 26, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29673.

TRD-200403179  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 10, 2004

◆ ◆ ◆  
**Notice of Application for Amendment to Service Provider  
Certificate of Operating Authority**

On May 7, 2004, Smoke Signal Communications filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60052. Applicant intends to reflect a change in ownership.

The Application: Application of Smoke Signal Communications for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 29682.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 26, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29682.

TRD-200403188  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 11, 2004

◆ ◆ ◆  
**Notice of Application for Waiver of Denial of Request for  
NXX Code**

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on May 4, 2004, for waiver of denial

by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of 1stel, Inc.'s request for additional telephone numbers in Weatherford, Texas.

Docket Title and Number: Petition of 1stel, Inc. for Review of Pooling Administrator's Denial of Application for Numbering Resources. Docket Number 29662.

The Application: 1stel, Inc. requested the commission direct the NANPA or Neustar to provide 1stel, Inc. with a 1,000 number block for Weatherford, Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than June 4, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29662.

TRD-200403074  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 6, 2004

◆ ◆ ◆  
**Notice of Application to Amend Certificated Service Area  
Boundaries**

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on May 3, 2004, for an amendment to certificated service area boundaries within Brown County, Texas.

Docket Style and Number: Application of Comanche Electric Cooperative Association (Comanche) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries in Brown County, Docket Number 29651.

The Application: The application encompasses an area of land which is singly certificated to Oncor Electric Delivery Company (Oncor). Comanche received a letter request from an electric service customer to provide one meter point electric utility service to accommodate irrigation for agriculture. Oncor does not have electric distribution facilities immediately within the proposed area. Oncor has agreed with the proposed boundary change. The estimated cost to Comanche to provide service to this proposed area is \$6,000. Significantly greater construction costs would be required of both the consumer and Oncor to provide the requested service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than May 28, 2004, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 29651.

TRD-200403073  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 6, 2004



## Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on May 7, 2004, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County (California Crossing Subdivision Section II). Docket Number 29683.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville (City). BPUB received a letter request to provide electric utility service to a proposed 21.53 acre subdivision called California Crossing Subdivision Section II located in north Brownsville just east of intersection S.H. 100 and FM 803, on the south side of S.H. 100. There are no electric distribution facilities within the proposed area. The estimated cost to BPUB to provide service to this proposed area is \$233,562.24.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than June 1, 2004, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 29683.

TRD-200403182

Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 11, 2004



## Notice of Application to Amend Designation as an Eligible Telecommunications Provider Pursuant to P.U.C. Substantive Rule §26.417

Notice is given to the public of an application filed with the Public Utility Commission of Texas on May 3, 2004, for an amendment to designation as an eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.417.

Docket Title and Number: Application of Santa Rosa Telephone Cooperative, Inc. to Amend its Designation as an Eligible Telecommunications Provider (ETP) Pursuant to P.U.C. Substantive Rule §26.417. Docket Number 29654.

The Application: The company is requesting to amend its ETP designation in order to receive designation in the Aspermont exchange in which Valor Telecommunications of Texas, LP is the incumbent provider. The company holds Service Provider Certificate of Operating Authority Number 60373.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than June 10, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29654.

TRD-200403071

Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 6, 2004



## Notice of Application to Amend Designation as an Eligible Telecommunications Carrier Pursuant to P.U.C. Substantive Rule §26.418

Notice is given to the public of an application filed with the Public Utility Commission of Texas on May 3, 2004, for an amendment to designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Santa Rosa Telephone Cooperative, Inc. to Amend its Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to P.U.C. Substantive Rule §26.418. Docket Number 29656.

The Application: The company is requesting to amend its ETC designation in order to receive designation in the Aspermont exchange in which Valor Telecommunications of Texas, LP is the incumbent provider. The company holds Service Provider Certificate of Operating Authority Number 60373.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than June 10, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29656.

TRD-200403072  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: May 6, 2004



## Public Notice of CCN Holders Filing Requirements in Order to Calculate the Weighted Statewide Average Composite Usage Sensitive Intrastate Switched Access Rates

The Public Utility Commission of Texas (commission) is required to recalculate the weighted statewide average composite usage sensitive intrastate switched access rates pursuant to P.U.C. Substantive Rule §26.223. In order to calculate the statewide average, CCN holders are required to submit updated intrastate switched access data. Therefore, all CCN holders must provide the following intrastate data to the commission as a compliance filing pursuant to Substantive Rule §26.223(f)(2) by June 21, 2004:

(A) The current tariffed rate for originating and terminating common carrier line (CCL).

(B) The current tariffed rate for originating and terminating local switching (LS).

(C) The current tariffed rate for originating and terminating transport (TR).

(D) The current tariffed rate for originating and terminating tandem switching (TS).

(E) The current average per minute rate for originating and terminating tandem switch transport (TST).

(F) The current originating and terminating tariffed rate(s) for any other usage sensitive intrastate switched access rate element(s).

(G) The total actual originating and terminating MOUs for the most recent 12-month period for each rate element in subparagraphs (A) - (F) of this paragraph.

SWBT, Verizon, and Sprint Centel/United compliance filings should also include the originating and terminating revenues and minutes of use from direct transport and entrance facilities for the most recent 12-month period.

CCN holders' compliance filings should be filed in Project Number 29667 no later than June 21, 2004.

Questions concerning this notice should be referred to James Kelsaw, Senior Network Analyst, Telecommunications Division at (512) 936-7338. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200403187

Adriana Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: May 11, 2004

## Texas Residential Construction Commission

### Public Hearing on Proposed Rules

The commission has published proposed rules for comment regarding the State-Sponsored Inspection and Dispute Resolution Process (SIRP). The rules were published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4369). The commission has received a request for a public hearing pursuant to Government Code §2001.029(b)(3). The last day for providing written comment on the rules is May 28, 2004. The public hearing will be held at the commission offices in the Commission Hearing Room at the Texas Residential Construction Commission, 311 East 14th Street, Suite 200, Austin, Texas 78701. The hearing will begin at 9 a.m. on Wednesday, May 26, 2004, and will conclude after the last registered speaker has had an opportunity to provide comments.

Persons wishing to attend the public hearing who require auxiliary aids, services or materials in an alternate format, please contact the Texas Residential Construction Commission at least five working days prior to the meeting date. Phone: (512) 463-1040, Fax: (512) 463-9507, E-mail: dora.rivera@trcc.state.tx.us, TDD Relay Texas: 1-800-relay-VV (for voice), 1-800-TX (for TDD).

Comments on the proposed rules may be filed by submitting 16 copies to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas 78711-3144 by May 28, 2004. Comments may be filed electronically at comments@trcc.state.tx.us. All responses should reference the State-Sponsored Inspection and Dispute Resolution Process and should be organized consistent with the proposed rule text. Questions concerning this notice should be referred to Ms. Durso at (512) 475-0595 or susan.durso@trcc.state.tx.us.

TRD-200403225

Susan Durso

General Counsel

Texas Residential Construction Commission

Filed: May 12, 2004

### Request for Comments on Star Builder Program

The commission is developing rules to serve as the foundation of the Texas Star Builder Program. The commission is required to adopt rules and procedures for a program to allow a builder to become designated as a "Texas Star Builder." Property Code §416.011(a). The commission is looking for input on the types of requirements and qualifications that would make the designation of "Texas Star Builder" meaningful to both the builder and the home-buying public. Staff will use comments submitted to draft rules that will be published for comment pursuant to the Administrative Procedures Act §2001.023.

In an effort to develop requirements and standards of consequence, the commission is asking interested persons to provide responses to the following questions as they relate to designation as a "Texas Star Builder" and to offer any other constructive comments that will further the commission's goal of offering a "Texas Star Builder" designation that embodies standards signifying excellence in the residential construction industry. The text of these questions are posted on the commission's web site: [www.trcc.state.tx.us](http://www.trcc.state.tx.us).

Comments may be filed by submitting 16 copies to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas 78711-3144 by June 14, 2004. Comments may be filed electronically at comments@trcc.state.tx.us. All responses should reference the Texas Star Builder Program. E-mailed responses should have "Star Builder Comments" in the subject line. This notice is not a formal notice of proposed rulemaking; however, the comments received will assist the commission in developing a commission policy or adopting rules in a related rulemaking. Questions concerning this notice should be referred to Ms. Durso at (512) 475-0595 or susan.durso@trcc.state.tx.us.

1) Is continuing education an important requirement? If a continuing education requirement is imposed, how many hours of continuing education should be required and should the requirement be an annual or biennial requirement? Should the educational courses be restricted to topics related to residential construction and issues affecting residential construction? If a builder is a corporate entity or partnership, who should be required to take the courses to fulfill the educational requirement? If a builder is a corporate entity or partnership, should the size of the company (i.e. number of employees) be reflected in the number of people who are required to fulfill the continuing education requirement?

2) Is the number of years of experience as a builder in residential construction a valuable qualification? How many years experience would be meaningful?

3) Is general liability insurance coverage important? Is warranty coverage important? Would the amount and/or type of coverage depend upon the individual home construction project?

4) Would information regarding the financial health of the builder, such as no evidence that any of the principals have ever filed for bankruptcy, be important?

5) Would the lack of unresolved verified complaints from consumers be important? If so, how many complaints over what period of time might result in denial of an application for Star Builder designation? Should the number of unresolved verified complaints be calculated as a percentage of homes registered by the builder over a period of time? In this question a "verified complaint" is defined as a complaint about the builder's practices made to the commission that the commission has investigated and verified as true and has not been resolved to the reasonable satisfaction of the builder and the complainant, as determined by the commission.

6) Should the qualifications include a certification of additional construction practices, e.g. best practices for foundations and water intrusion?

TRD-200403080

Susan Durso

General Counsel

Texas Residential Construction Commission

Filed: May 6, 2004



### **Strawman Proposal on Limited Statutory Warranty and Building and Performance Standards**

The commission is required to adopt limited statutory warranties and building and performance standards for residential construction in accordance with Chapter 430, Property Code, which was enacted by the 78th Texas Legislature pursuant to House Bill 730 (Act effective September 1, 2003, 78th Legislature, Regular Session, Chapter 458, §1.01). The warranties and building and performance standards adopted by the commission apply only to residential construction that begins on or after the effective date of those standards as determined by the commission. The Property Code §430.001(c) sets forth the parameters for the standards to be adopted by the commission. Chapter 430 of the Property Code can be viewed as a part of House Bill 730 on the commission's web site at [www.trcc.state.tx.us](http://www.trcc.state.tx.us) under "Statutes and Rules," then "HB 730." The statute permits the commission to adopt the standards in phases and to amend or supplement the rules "as the commission receives additional evidence or information from task forces or other sources regarding any improvements or developments in the areas of residential homebuilding practices, procedures, or technology." Property Code §430.001(h).

In an effort to develop effective, meaningful and well-reasoned standards, the commission is asking interested persons to file comments to the working draft of the Limited Statutory Warranty and Building and Performance Standards that the commission has posted on the commission's web site, [www.trcc.state.tx.us](http://www.trcc.state.tx.us), under "Warranty/Standards Working Draft" A copy of the strawman may also be requested by contacting the commission, toll free at 1-877-651-TRCC or (512) 463-1040. Staff will use comments submitted in developing rules that will be published for comment pursuant to the Administrative Procedures Act §2001.023.

Comments may be filed by submitting 16 copies to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas 78711-3144 by Friday, June 25, 2004. Comments may be filed electronically at [comments@trcc.state.tx.us](mailto:comments@trcc.state.tx.us). All responses should reference the Limited Statutory Warranty and Building Standards. E-mailed responses should have "Standards Strawman" in the subject line. Comments should be organized in a manner consistent with the "strawman" draft document. This notice is not a formal notice of proposed rulemaking; however, the comments received will assist the commission in developing a commission policy or adopting rules in a related rulemaking. Questions concerning the strawman proposal or this notice should be referred to Ms. Durso at (512) 475-0595 or [susan.durso@trcc.state.tx.us](mailto:susan.durso@trcc.state.tx.us).

TRD-200403081

Susan Durso

General Counsel

Texas Residential Construction Commission

Filed: May 6, 2004



**Texas A&M University, Board of Regents**

### **Request for Proposal**

Texas A&M University is seeking Proposals from an experienced consultant for assessing the feasibility of deploying Voice over Internet Protocol (VoIP) on a wide scale basis at Texas A&M University.

RFP MAIN 04-0020 may be obtained by contacting:

Mary Sue Goldwater

Associate Director of Purchasing Services

Texas A&M University

P.O. Box 30013

College Station, Texas 77842-0013

Or e-mail at [ms-goldwater@tamu.edu](mailto:ms-goldwater@tamu.edu)

Selection criteria will include competence, experience, knowledge, qualification, and reasonableness of price. Proposals must be received on or before 2:00 p.m., May 28, 2004.

TRD-200403069

Vickie Burt Spillers

Executive Secretary to the Board

Texas A&M University, Board of Regents

Filed: May 6, 2004



### **Texas Department of Transportation**

#### **Request for Competing Proposals and Qualifications**

Pursuant to the authority granted under Texas Transportation Code, Chapter 361, Subchapter I (the "Enabling Legislation"), the Texas Department of Transportation (TxDOT) may enter into comprehensive development agreements for the financing, design, construction, maintenance, or operation of turnpike projects. The Enabling Legislation authorizes private involvement in turnpike projects and provides a process for accepting and processing unsolicited proposals for such projects. Transportation Code, §361.3022, prescribes requirements for an unsolicited proposal and requires TxDOT, if a decision is made to further evaluate the unsolicited proposal, to publish a request for competing proposals and qualifications in the *Texas Register* that includes the criteria that will be used to evaluate the original proposal and any competing proposals, the relative weight given to the criteria, and a deadline by which the competing proposals must be received. The Texas Transportation Commission (commission) has promulgated rules located at Title 43, Texas Administrative Code, §§27.1 - 27.5 (the "Rules"), governing the submission and processing of unsolicited proposals and providing for publication of notice that TxDOT is seeking competing proposals and qualifications for development of a turnpike project with private involvement. The commission has received an unsolicited proposal and made a determination to further evaluate the unsolicited proposal.

This notice represents the next step in the process of responding to an unsolicited proposal received by TxDOT on March 30, 2004, from Managed Lanes, LP, a subsidiary of Peter Kiewit Sons', Inc. (MLLP), to develop, design, construct, finance, maintain, and operate tolled managed lanes along IH 820 and SH 183 from IH 35W to IH 35E in Dallas and Tarrant Counties, as well as portions of IH 35W, IH 35E, and other facilities to the extent necessary for connectivity and financing. The proposed turnpike project is approximately 27 miles long, and is located along the IH 820/SH 183 corridor in Dallas and Tarrant Counties that provides an east-west connection between IH 35W and IH 35E. The proposed project would ultimately provide four to six

tolled managed lanes along this corridor (varying from four to six managed lanes throughout the corridor), while maintaining no fewer than the existing number of general use lanes. MLLP is proposing to provide, operate, and maintain the new managed lanes, and to reconstruct general use lanes and frontage roads as required to meet travel demands within the IH 820/SH 183 corridor. System interchange, service interchange, and frontage road improvements are included. On April 29, 2004, in Minute Order 109646, the commission authorized TxDOT to commence the unsolicited proposal procurement process under Transportation Code, Chapter 361, Subchapter I.

Through this notice, TxDOT is seeking competitive proposals and qualifications submittals ("PQS") in response to a request for competing proposals and qualifications ("RFPQ"). TxDOT intends to evaluate the proposal submitted by MLLP and may request submission of a detailed proposal, potentially leading to negotiation, award, and execution of a comprehensive development agreement. TxDOT will accept for simultaneous consideration any PQS received in accordance with the Rules within 90 days of the publication of this notice. TxDOT anticipates issuing the RFPQ, receiving and analyzing the PQSs, developing a shortlist of proposing entities or consortia, and issuing a request for detailed proposals ("RFDP") to the shortlisted entities. After review and a best value evaluation of the RFDP responses, TxDOT may negotiate and enter into a comprehensive development agreement for the project.

**RFPQ Evaluation Criteria.** PQSs will be evaluated by TxDOT for shortlisting purposes using the following general criteria: relative strength and depth of entity qualifications, personnel qualifications, financial qualifications and legal qualifications; relative strength, feasibility and desirability of the proposed conceptual project development plan; and relative strength, feasibility and desirability of the proposed conceptual project financing plan. The specific criteria under the foregoing subcategories will be identified in the RFPQ, as will the relative weighting of the criteria.

**Release of RFPQ and Due Date.** TxDOT currently anticipates that the RFPQ will be available on May 21, 2004. The RFPQ will include a conceptual project design. Copies of the RFPQ will be available at TxDOT's offices: Texas Department of Transportation, 125 East 11th Street, 5th Floor, Austin, Texas 78701, or on the following web site:

<http://www.dot.state.tx.us>

PQSs will be due on August 12, 2004.

TRD-200403090

Bob Jackson

Deputy General Counsel

Texas Department of Transportation

Filed: May 7, 2004

## The University of Texas System

### Notice of Intent to Seek Consulting Services

The University of Texas Health Center at Tyler ("UTHC-T") is currently implementing various MEDITECH/LSS Software Application Modules (the "Project"). Phase 1 of the Project was completed on 03/17/2004 when UTHC-T achieved and accepted go-live on the Meditech client server Health Care Information System ("HCIS") system as well as the LSS Medical and Practice Management Module.

UTHC-T has purchased additional Meditech/LSS Software Application Modules for implementation during later phases of the Project. However, UTHC-T is also considering whether it should purchase certain other MEDITECH/LSS Software Application Modules for implementation during subsequent phases of the Project. Furthermore,

UTHC-T wishes to determine which Meditech/LSS Software Application Modules should be implemented during the next phase of the Project ("Phase 2") and which should not be implemented until a later phase of the Project (e.g., "Phase 3").

UTHC-T is looking for a Proposer to provide the assistance UTHC-T requires to conduct pre-implementation planning for Phase 2 of the Project. However, other than defining those Meditech/LSS Software Application Modules, which, at the earliest, will not be implemented by UTHC-T until Phase 3 of the Project, the Proposer will not perform pre-implementation services for Phase 3 as a result of this Invitation. -It is expected that the successful Proposer will perform the pre-implementation planning services required by UTHC-T in two stages. The initial stage is expected to include the successful Proposer's review of all of the Meditech/LSS Software Application Modules that UTHC-T may implement during Phase 2, including all of the Modules UTHC-T has already determined will be implemented in Phase 2, as well as those Modules that UTHC-T is currently considering for implementation during Phase 2. The successful Proposer will ensure that UTHC-T clearly understands the dependencies of all Meditech/LSS Software Application Modules to be implemented or that are being considered for implementation during Phase 2, as well as the stability of each Module. In addition, the successful Proposer will review and jointly analyze with UTHC-T the Project resources, budget, and timeline UTHC-T has available for Phase 2 of the Project. As a result of such an analysis performed jointly by UTHC-T and the successful Proposer, UTHC-T and the successful Proposer will create a written document defining the specific Meditech/LSS Software Application Modules that UTHC-T will implement during Phase 2 of the Project (the "Phase 2 Modules"). The initial stage will conclude, and the second stage will begin, upon the definition of the Phase 2 Modules by UTHC-T and the successful Proposer. During the second stage of the pre-implementation planning services, the successful Proposer will provide the following major deliverables to UTHC-T: -Detailed prioritized Project Phase 2 plan including tasks and timelines for each Meditech/LSS Software Application Module being implemented -Project organizational chart -Revised budget estimate for Phase 2

The UTHC-T President has made a finding that the consulting services are necessary. UTHC-T does not currently have staff with expertise or implementation experience with the MEDITECH/LSS Software Application Modules being considered for Phase 2 of the Project.

The award for services will be made by a review of competitive sealed proposals that will result in the best value to UTHC-T.

Parties interested in a copy of the Request for Proposal should contact:

Ms. Christine Bradford

Senior Procurement Officer

The University of Texas Health Center at Tyler

11937 U.S. Highway 271

Tyler, TX 75708-3154

Voice: 903-877-5710

Email: [Christine.Bradford@uthct.edu](mailto:Christine.Bradford@uthct.edu)

The proposal submission deadline will be June 30, 2004.

TRD-200403215

Francie A. Frederick

Counsel and Secretary to the Board

The University of Texas System

Filed: May 12, 2004

## Texas Water Development Board

### Applications Received

Pursuant to the Texas Water Code, §6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

Greater Texoma Utility District, 5100 Airport Drive, Denison, Texas, 75020, received March 29, 2004, application for financial assistance in the amount of \$510,000 from the Texas Water Development Funds.

City of Weslaco, 500 South Kansas Street, Weslaco, Texas, 78596, received January 6, 2003, application for financial assistance in the amount of \$2,000,000 from the Texas Water Development Funds.

Fort Bend Municipal Utility District No. 19, c/o The GMS Group, 5075 Westheimer, Suite 1175, Houston, Texas, 77056, received January 15, 2004, application for financial assistance in the amount of \$1,625,000 from the Texas Water Development Funds.

Fort Bend County Fresh Water Supply District No. 1, P.O. Box 190, Fresno, Texas, 77056, received March 31, 2004, application for financial assistance in the total amount of \$11,970,000 from the Texas Water Development Funds and the Clean Water State Revolving Fund.

City of Fort Worth, 1000 Throckmorton, Fort Worth, Texas, 76102, received April 5, 2004, application for financial assistance in the amount of \$29,560,000 Clean Water State Revolving Fund.

City of Houston, P.O. Box 1562, Houston, Texas, 77251, received November 26, 2003, application for financial assistance in the amount of \$71,365,000 from the Clean Water State Revolving Fund.

City of Houston, P.O. Box 1562, Houston, Texas, 77251, received September 3, 2003, application for financial assistance in the amount of \$61,215,000 from the Clean Water State Revolving Fund.

Panhandle Planning Commission, P.O. Box 9257, Amarillo Texas, 79105, received April 1, 2004, application for financial assistance in an amount not to exceed \$156,813 from the Research and Planning Fund.

Red River Authority, 900 8th Street, Suite 520, Wichita Falls, Texas, 76301-6894, received April 1, 2004, application for financial assistance in an amount not to exceed \$50,000 from the Research and Planning Fund.

North Texas Municipal Water District, P.O. Box 2408, Wylie Texas, 75098, received April 1, 2004, application for financial assistance in an amount not to exceed \$442,356 from the Research and Planning Fund.

Northeast Texas Municipal Water District, P.O. Box 955, Hughes Springs, Texas, 75656, received April 1, 2004, application for financial assistance in an amount not to exceed \$148,000 from the Research and Planning Fund.

Rio Grande Council of Governments, 1100 North Stanton, Suite 610, El Paso, Texas, 79002, received March 31, 2004, application for financial assistance in an amount not to exceed \$80,000 from the Research and Planning Fund.

Colorado River Municipal Water District, 400 East 24th Street, P.O. Box 869, Big Spring, Texas, 78721, received March 29, 2004, application for financial assistance in an amount not to exceed \$340,000 from the Research and Planning Fund.

Brazos River Authority, P.O. Box 7555, Waco Texas, 76714, received April 1, 2004, application for financial assistance in an amount not to exceed \$513,825 from the Research and Planning Fund.

San Jacinto River Authority, P.O. Box 329, Conroe, Texas, 77305, received March 31, 2004, application for financial assistance in an amount not to exceed \$253,000 from the Research and Planning Fund.

Deep East Texas Council of Governments, 274 East Lamar Street, Jasper Texas, 75951, received April 1, 2004, application for financial assistance in an amount not to exceed \$126,000 from the Research and Planning Fund.

San Antonio River Authority, P.O. Box 839980, San Antonio, Texas, 78283, received March 31, 2004, application for financial assistance in an amount not to exceed \$168,873 from the Research and Planning Fund.

Nueces River Authority, 6300 Ocean Drive, Corpus Christi, Texas, 78412, received April 1, 2004, application for financial assistance in an amount not to exceed \$49,000 from the Research and Planning Fund.

High Plains Underground Water Conservation District No. 1, 2930 Avenue Q, Lubbock, Texas, 79405, received March 31, 2004, application for financial assistance in an amount not to exceed \$35,000 from the Research and Planning Fund.

TRD-200403162

Suzanne Schwartz

General Counsel

Texas Water Development Board

Filed: May 10, 2004

## Texas Workers' Compensation Commission

### Invitation to Apply to the Medical Advisory Committee (MAC)

The Texas Workers' Compensation Commission seeks to have a diverse representation on the MAC and invites all qualified individuals from all regions of Texas to apply for openings on the MAC in accordance with the eligibility requirements of the Procedures and Standards for the Medical Advisory Committee. The Medical Review Division is currently accepting applications for the following Medical Advisory Committee vacancies:

#### Primary

- \* Dentist
- \* Employer
- \* General Public 1

#### Alternate

- \* Public Health Care Facility Representative
- \* Dentist
- \* Pharmacist,
- \* Employer
- \* General Public 1
- \* Insurance Carrier

Commissioners for the Texas Workers' Compensation Commission appoint the Medical Advisory Committee members who are composed of 18 primary and 18 alternate members representing health care providers, employees, employers, insurance carriers, and the general public. Primary members are required to attend all Medical Advisory Committee meetings, subcommittee meetings, and work group meetings to which they are appointed. The alternate member may attend all meetings, however during a primary member's absence, the alternate member must attend all meetings to which the primary

member is appointed. Requirements and responsibilities of members are established in the Procedures and Standards for the Medical Advisory Committee as adopted by the Commission.

The Medical Advisory Committee meetings must be held at least quarterly each fiscal year during regular Commission working hours. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings.

The purpose and task of the Medical Advisory Committee, which includes advising the Commission's Medical Review Division on the development and administration of medical policies, rules and guidelines, are outlined in the Texas Workers' Compensation Act, §413.005.

Applications and other relevant Medical Advisory Committee information may be viewed and downloaded from the Commission's website at <http://www.twcc.state.tx.us> and then clicking on Calendar of Commission Meetings, Medical Advisory Committee. Applications may also be obtained by calling Jane McChesney, MAC Coordinator, at 512-804-4855 or R. L. Shipe, Director, Medical Review, at 512-804-4802.

The qualifications as well as the terms of appointment for all positions are listed in the Procedures and Standards for the Medical Advisory Committee. These Procedures and Standards are as follows:

**LEGAL AUTHORITY.** The Medical Advisory Committee for the Texas Workers' Compensation Commission, Medical Review Division is established under the Texas Workers' Compensation Act, (the Act) §413.005.

**PURPOSE AND ROLE.** The purpose of the Medical Advisory Committee (MAC) is to bring together representatives of health care specialties and representatives of labor, business, insurance and the general public to advise the Medical Review Division in developing and administering the medical policies, fee guidelines, and the utilization guidelines established under §413.011 of the Act.

**COMPOSITION Membership.** The composition of the committee is governed by the Act, as it may be amended. Members of the committee are appointed by the Commissioners and must be knowledgeable and qualified regarding work-related injuries and diseases.

Members of the committee shall represent specific health care provider groups and other groups or interests as required by the Act, as it may be amended. As of September 1, 2001, these members include a public health care facility, a private health care facility, a doctor of medicine, a doctor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, and an acupuncturist. Appointees must have at least six (6) years of professional experience in the medical profession they are representing and engage in an active practice in their field.

The Commissioners shall also appoint the other members of the committee as required by the Act, as it may be amended. An insurance carrier representative may be employed by: an insurance company; a certified self-insurer for workers' compensation insurance; or a governmental entity that self-insures, either individually or collectively. An insurance carrier member may be a medical director for the carrier but may not be a utilization review agent or a third party administrator for the carrier.

A health care provider member, or a business the member is associated with, may not derive more than 40% of its revenues from workers compensation patients. This fact must be certified in their application to the MAC.

The representative of employers, representative of employees, and representatives of the general public shall not hold a license in the health

care field and may not derive their income directly from the provision of health care services.

The Commissioners may appoint one alternate representative for each primary member appointed to the MAC, each of whom shall meet the qualifications of an appointed member.

**Terms of Appointment:** Members serve at the pleasure of the Commissioners, and individuals are required to submit the appropriate application form and documents for the position. The term of appointment for any primary or alternate member will be two years, except for unusual circumstances (such as a resignation, abandonment or removal from the position prior to the termination date) or unless otherwise directed by the Commissioners. A member may serve a maximum of two terms as a primary, alternate or a combination of primary and alternate member. Terms of appointment will terminate August 31 of the second year following appointment to the position, except for those positions that were initially created with a three-year term. For those members who are appointed to serve a part of a term that lasts six (6) months or less, this partial appointment will not count as a full term.

Abandonment will be deemed to occur if any primary member is absent from more than two (2) consecutive meetings without an excuse accepted by the Medical Review Division Director. Abandonment will be deemed to occur if any alternate member is absent from more than two (2) consecutive meetings which the alternate is required to attend because of the primary member's absence without an excuse accepted by the Medical Review Division Director.

The Commission will stagger the August 31st end dates of the terms of appointment between odd and even numbered years to provide sufficient continuity on the MAC.

In the case of a vacancy, the Commissioners will appoint an individual who meets the qualifications for the position to fill the vacancy. The Commissioners may re-appoint the same individual to fill either a primary or alternate position as long as the term limit is not exceeded. Due to the absence of other qualified, acceptable candidates, the Commissioners may grant an exception to its membership criteria, which are not required by statute.

**RESPONSIBILITY OF MAC MEMBERS Primary Members.** Make recommendations on medical issues as required by the Medical Review Division.

Attend the MAC meetings, subcommittee meetings, and work group meetings to which they are appointed.

Ensure attendance by the alternate member at meetings when the primary member cannot attend.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies.

**Alternate Members.** Attend the MAC meetings, subcommittee meetings, and work group meetings to which the primary member is appointed during the primary member's absence.

Maintain knowledge of MAC proceedings.

Make recommendations on medical issues as requested by the Medical Review Division when the primary member is absent at a MAC meeting.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies when the primary member is absent from a MAC meeting.

**Committee Officers.** The chairman of the MAC is designated by the Commissioners. The MAC will elect a vice chairman. A member shall

be nominated and elected as vice chairman when he/she receives a majority of the votes from the membership in attendance at a meeting at which nine (9) or more primary or alternate members are present.

**Responsibilities of the Chairman.** Preside at MAC meetings and ensure the orderly and efficient consideration of matters requested by the Medical Review Division.

Prior to a MAC meeting confer with the Medical Review Division Director, and when appropriate, the TWCC Executive Director to receive information and coordinate:

- a. Preparation of a suitable agenda.
- b. Planning MAC activities.
- c. Establishing meeting dates and calling meetings.
- d. Establishing subcommittees.
- e. Recommending MAC members to serve on subcommittees.

If requested by the Commission, appear before the Commissioners to report on MAC meetings.

**COMMITTEE SUPPORT STAFF.** The Director of Medical Review will provide coordination and reasonable support for all MAC activities. In addition, the Director will serve as a liaison between the MAC and the Medical Review Division staff of TWCC, and other Commission staff if necessary.

The Medical Review Director will coordinate and provide direction for the following activities of the MAC and its subcommittees and work groups:

Preparing agenda and support materials for each meeting.

Preparing and distributing information and materials for MAC use.

Maintaining MAC records.

Preparing minutes of meetings.

Arranging meetings and meeting sites.

Maintaining tracking reports of actions taken and issues addressed by the MAC.

Maintaining attendance records.

**SUBCOMMITTEES.** The chairman shall appoint the members of a subcommittee from the membership of the MAC. If other expertise is needed to support subcommittees, the Commissioners or the Director of Medical Review may appoint appropriate individuals.

**WORK GROUPS.** When deemed necessary by the Director of Medical Review or the Commissioners, work groups will be formed by the Director. At least one member of the work group must also be a member of the MAC.

**WORK PRODUCT.** No member of the MAC, a subcommittee, or a work group may claim or is entitled to an intellectual property right in work performed by the MAC, a subcommittee, or a work group.

**MEETINGS Frequency of Meetings.** Regular meetings of the MAC shall be held at least quarterly each fiscal year during regular Commission working hours.

**CONDUCT AS A MAC MEMBER.** Special trust has been placed in members of the Medical Advisory Committee. Members act and serve on behalf of the disciplines and segments of the community they represent and provide valuable advice to the Medical Review Division and the Commission. Members, including alternate members, shall observe the following conduct code and will be required to sign a statement attesting to that intent.

**Comportment Requirements for MAC Members:**

Learn their duties and perform them in a responsible manner;

Conduct themselves at all times in a manner that promotes cooperation and effective discussion of issues among MAC members;

Accurately represent their affiliations and notify the MAC chairman and Medical Review Director of changes in their affiliation status;

Not use their memberships on the MAC: a. in advertising to promote themselves or their business. b. to gain financial advantage either for themselves or for those they represent; however, members may list MAC membership in their resumes;

Provide accurate information to the Medical Review Division and the Commission;

Consider the goals and standards of the workers' compensation system as a whole in advising the Commission;

Explain, in concise and understandable terms, their positions and/or recommendations together with any supporting facts and the sources of those facts;

Strive to attend all meetings and provide as much advance notice to the Texas Workers' Compensation Commission staff, attn: Medical Review Director, as soon as possible if they will not be able to attend a meeting; and

Conduct themselves in accordance with the MAC Procedures and Standards, the standards of conduct required by their profession, and the guidance provided by the Commissioners, Medical Review Division or other TWCC staff.

TRD-200403185

Susan Cory

General Counsel

Texas Workers' Compensation Commission

Filed: May 11, 2004

◆ ◆ ◆

### How to Use the Texas Register

**Information Available:** The 14 sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Secretary of State** - opinions based on the election laws.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rules** - sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

**Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

**Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Texas Department of Banking** - opinions and exempt rules filed by the Texas Department of Banking.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules** - notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

**Review of Agency Rules** - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cite:** Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 29 (2004) is cited as follows: 29 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 TexReg 3."

**How to Research:** The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code*, section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online through the Internet. The address is: <http://www.sos.state.tx.us>. The *Register* is available in an .html

version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

### Texas Administrative Code

The *Texas Administrative Code (TAC)* is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the TAC.

The TAC volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at <http://www.sos.state.tx.us/tac>. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the TAC, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cite:** Under the TAC scheme, each section is designated by a TAC number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the *Texas Administrative Code*; TAC stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to update:** To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Table of TAC Titles Affected*. The table is published cumulatively in the blue-cover quarterly indexes to the *Texas Register* (January 16, April 9, July 9, and October 8, 2004). If a rule has changed during the time period covered by the table, the rule's TAC number will be printed with one or more *Texas Register* page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

*Part I. Texas Department of Human Services*

40 TAC §3.704.....950, 1820

The *Table of TAC Titles Affected* is cumulative for each volume of the *Texas Register* (calendar year).



Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates and quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

☐ **Change of Address**

*(Please fill out information below)*

☐ **Paper Subscription**

☐ One Year \$200

☐ First Class Mail \$300

☐ **Back Issue (\$10 per copy)**

\_\_\_\_\_ Quantity

Volume \_\_\_\_\_, Issue # \_\_\_\_\_.

*(Prepayment required for back issues)*

NAME \_\_\_\_\_

ORGANIZATION \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_

PHONE NUMBER \_\_\_\_\_

FAX NUMBER \_\_\_\_\_

Customer ID Number/Subscription Number \_\_\_\_\_

*(Number for change of address only)*

**Payment Enclosed via** ☐ Check ☐ Money Order

Mastercard/VISA Number \_\_\_\_\_

Expiration Date \_\_\_\_/\_\_\_\_ Signature \_\_\_\_\_

Please make checks payable to the Secretary of State. Subscription fees are not refundable.  
Do not use this form to renew subscriptions.

Visit our home on the internet at <http://www.sos.state.tx.us>.

\_\_\_\_\_  
\_\_\_\_\_  
Periodical Postage

PAID

Austin, Texas  
and additional entry offices  
\_\_\_\_\_  
\_\_\_\_\_